FROM PUNISHMENT TO PREVENTION

By

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With a Foreword by

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PREFACE

THE classical school has passed away; other schools are striving for supremacy. In the field of actual work, however, there is a tendency to evolve a practical harmony. To bring out this harmony underlying apparent conflict, I have endeavoured to make a rapid survey of penal systems in different countries and in different epochs.

I do not claim that my treatment is exhaustive. Much of the ground covered in other published works I have taken for granted. As for my conclusions, I am conscious that they are open to controversy and I take full responsibility for them.

The work embodies the results of close study and research. I owe it to the inspiration received from the late Professor Enrico Ferri during the days of the First Congress of the Association internationale de Droit Pénal held at Brussels in 1926. Later on, Professor Ferri offered to sponsor it. To my misfortune, before the manuscript could be sent to him, the Professor had passed into the Unseen. To him I owe a deep debt of gratitude for the warmth and fervour of his encouragement.

To another distinguished penologist I owe a debt which I cannot repay. I am deeply grateful to Sir Evelyn Ruggles-Brise for his kindness in sponsoring this book. Anything from his pen on the subject of penology carries its own weight. The Foreword with which he has favoured this production and which forms his latest contribution to the literature of penology has laid the author and the public under great obligation.

I desire also to acknowledge my debt to my friend Dr. Ananta Prasad Banerjee Shastri, Professor of History, Patna College. But for his ungrudging help in various

forms it is doubtful if the manuscript could have been made ready for the press. It had to be written amid the stress and strain of professional work at the Bar. The company and comradeship of Dr. Shastri proved an unfailing source of help and comfort.

Last, but not least, my thanks are due to writers and devoted workers of various nationalities in the field of penology with whom I have had the privilege of being in intimate association for years and whose friendship has ever been an inspiration to me.

It will be a sufficient recompense if the present work helps forward penal reform in any the least degree, specially in the author's own homeland.

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FOREWORD

THIS work proceeding from a distinguished Indian jurist is of great international interest. It begins by a statement of the affinities between Hindu and European law and proceeds with a profound and acute examination of the various theories of the function of criminal law in the various countries of Europe.

He shows how in the early Indian codes the idea of vengeance is absent; punishment is a law of 'righteousness' emanating from the divine right of kings, but its leading principle is intimidation. But so far back as the ninth century we find almost an anticipation of the commentaries of Blackstone: 'The age, education, and character of the offender; the repetition of the offence. All these and a thousand other incidents may aggravate or extenuate the crime.' An interesting and almost unique glimpse of the modern 'Science Pénitentiaire', which studies not only the objective features of the offence, but the subjective limitations of the offender.

The distinction between moral and legal culpability was unknown to the ancient systems of law. Vengeance was the dominating note, as of the early Germanic codes: the *lex talionis*, instinctive justice, punishment proportionate to the offence. It was because such a proportion was impossible to attain that the conflict arose and slowly widened between the so-called classical or utilitarian school and the modern positivist or neo-classical school, which has perhaps been led to exaggerate the importance of biological and psychological factors as causes of crime.

It is stated that in all the penal codes and 'Projets de Loi' which have appeared since the War the legislator has almost abandoned the principle of 'punishment in proportion to the offence'.

The Congress on criminal law held at Brussels in 1926 recorded the following opinion, namely, 'punishment as the sole sanction for criminal offence does not meet the requirements of protection against crime, either as regards offenders who are more dangerous on account of their criminal tendencies or as regards young persons who may be considered more or less capable of being reformed'.

If this view is carried too far there is, of course, a danger that the older view of retribution may be lost sight of. Lord Oxford, addressing the London Congress, 1925, quoted from Professor Sidgwick: 'In England, at least, we seem to keep the older view, i.e. the retributive, that resentment is universalized in criminal justice. The principle that punishment should be merely deterrent and reformatory is too purely utilitarian for current opinion.' The ethical resentment of the community has not yet been banished, if it ever will be, from the penal administration of civilized states.

In an interesting chapter on the purpose of the law, and quoting Blackstone, that the 'criminal law in every country in Europe is more rude and imperfect than the civil', the author proceeds to demonstrate that the purpose of the law must depend on the 'social conscience' of the age, and so, from this point of view, the 'Declaration of Rights', 1789, may be said to mark the beginning of a system of punishment based on the principle that penal law is intended not only to punish but also to reform the offender.

This purpose of reforming the offender has led to the particular tendency of modern penology to lay stress on the determination of the physical and mental make-up of the individual.

All the sciences concerned directly or indirectly with the springs of human activity become necessary adjuncts of any system of punishment. We must know the play

of forces, implied in all anti-social conduct. Moreover, all the subtleties, metaphysical and religious, involved in the question of free will—necessity, must play their part.

'La défense sociale', with its corollary, 'L'hygiène préventive', are the field where Law and Science meet and together determine the degree of responsibility and the measures, either of protection or cure, which the circumstances call for.

This conception of 'La défense sociale', if one may judge from the language and tendency not only of recent congresses but also of the more recent draft penal codes, if carried too far would lead to the elimination of the old classical view of punishment, expressing as it does the instinctive ideas of retribution and deterrence. But the two schools of thought, the classical and the positivist, are not entirely inconsistent, and the experience of the last half century would seem to point to a compromise being found which will sufficiently recognize the value of each school. For the law in punishing the offence is coming more and more to regard the individuality of the offender, and on that depends the nature of the punishment; either a quick and sharp penalty of a retributive kind, or a 'mesure de sûreté', for the protection of society.

As stated by Professor Ferri at the London Congress of 1925, 'Lombroso's greatest merit was to call the attention of the world to the personality of the offender. Formerly men knew penal justice, but penal justice did not know men'. At present nearly all countries have adopted or are adopting what, as distinct from the 'dosimétrie pénale' of the old system, are really 'mesures de sûreté', e.g. 'sursis à l'exécution de la peine', probation, the indeterminate sentence, and parole (in the United States of America), preventive detention and the Borstal system (in England). These measures are all directed to two principal ends: (1) the rehabilitation of the offender; (2) the protection

of society. This is social defence by the adoption of protective or safeguarding measures. The extremists of the Italian school would, I believe, be ready to agree that punishment in its classical sense must be conserved. It must be completed and supplemented by all that affects the 'personality' and the 'Temibilità' (formidableness) of the offender. Penal law in its later manifestations is being directed to this end.

At the London Congress, 1925, the then Lord Chancellor of England (Lord Cave) in a notable address, after commenting upon the reformatory ideas underlying the Borstal and Indeterminate systems, expressed the opinion that 'the experience gained in this country might be used in inaugurating a further advance on the same lines, and we might well pursue our efforts to combat crime, not exclusively by the method of the fixed sentence, but also by a further effort for the improvement and reformation of the criminal in the spirit, which has animated the earnest and humane men who have advanced the principle of the Indeterminate sentence'.

The book reveals a very careful study of the elaborate theories of the function of punishment which are at this time prevailing in Europe. The review of the Russian Draft Code of 1927 is of particular interest, as revealing in its most extreme sense the abandonment of the old classical concepts.

The book and the temper which inspires it is a valuable contribution to that exchange of 'International Thought' which, it has been truly said, is the only hope for the salvation of the world. It illustrates also the wisdom of the words which form the preface of the programme of the 'Association internationale de Droit Pénal', founded in 1924: 'Nous ne visons aucun but politique, nous ne subordonnons nos travaux à aucun "Credo scientifique". Toutes les écoles qui luttent sur le terrain de droit pénal

peuvent s'enorgueillir de posséder une part du vrai. Aucune ne saurait s'en arroger le monopole; notre seule préoccupation est de faire régner plus de justice et le désir de venir en aide à l'humanité.'

E. RUGGLES-BRISE,

LATE PRESIDENT INTERNATIONAL PRISON COMMISSION.

'All theories on the subject of Punishment have more or less broken down: and we are at sea as to first principles.'

SIR HENRY MAINE

I

ANCIENT PENAL CONCEPTIONS

1. CRIMINOLOGY AND PENOLOGY—MUTUALLY COMPLEMENTARY

WHAT are the causes of crime? What, if any, are its remedies? Do they lie in repression, prevention, or cure? These are the outstanding questions that demand an answer. The majority scout the theory of cure, and at once dismiss it as pernicious. A minority welcome it as the only means of salvation. Is the true answer to be found in any one of the three remedies? Or may it lie in a middle course harmonizing the principles of all three?

These same questions recur in a treatment of penology. For it is indeed a thin line which divides the two sciences, and it is being recognized more and more that the connexion between them is so intimate that their problems inevitably overlap. With this recognition the distinction between penology and criminology is rapidly disappearing. *La science penitentiaire* is to-day an ever-widening investigation in which criminology and penology merge,[1] and the problems of the two require and receive the same attention. It has been said that there is no school of criminology in England.[2] Viewed in the light of the rapid growth of criminology on the Continent during the last century, it is true that England reveals a conspicuously different attitude towards the study of crime. Yet there can be no doubt that in all the active practical endeavours for prison reform in Great Britain there is a pronounced emphasis on the prevention, if not the cure, of crime. In

[1] Compare the terms *Gefangnisswesen* and *Gefangnisskunde* in German which define in a comprehensive manner what this branch of human knowledge is, if looked at from the point of view of science or from that of art.

[2] *Prison Reform at Home and Abroad*, by Sir Evelyn Ruggles Brise, K.C.B., published by Macmillan & Co. (1924), p. 16.

the Borstals and reformatories, the special treatment of juvenile and adolescent offenders, the succour of waifs and strays, the treatment of vagrants and drunkards, the system of probation, admonition, and conditional discharge, not to speak of the ever-growing organization for after-care and patronage of prisoners on discharge, there is a manifest recognition of the fundamental causes of crime and of the principle that the punishment of offenders is not the only object to be sought; that far more important than punishment is the rehabilitation of the criminal, where that is possible; and more important still the prevention of crime itself by destroying the sources from which it springs.

2. ANCIENT CONCEPTION OF PUNISHMENT

The point of view which accepts penology and criminology as complementary to each other is comparatively new. Time was when the penologist could begin with the hypothesis that repressive punishment is the bulwark of the State against crime and that the King is divinely entrusted with the rod of punishment. The doctrine of a divine right of kings, in a form more or less pronounced, was accepted as the postulate of government in most ancient States. There was of course the arbitrary rule of tyrants whose will was law, but directly we come to consider communities in ancient times, whose discipline was that of the State, we find three distinct streams of thought that intermingle in varying degrees. First, where the sanction is that of the social conscience, sometimes reflected clearly, sometimes not, in the different stages of its growth. Secondly, where the sanction is the power of the royal person representing divinity, the fountain head of right and justice (*Dieu et mon droit*) in whom is vested the right of chastisement for the purpose of preserving peace and order. Thirdly, where there is no divine right and no

social conscience clearly recognized, the ruler of the realm invested with power by force or chance exercises his rule, following out the above sanctions spontaneously and almost unconsciously.

The principle that prevails, however, in all these is the objective or utilitarian one—the preservation of peace and order, the protection of the weak and the punishment of the wicked in proportion to the gravity of the offence. Why or wherefore the offender should have committed the offence; whether he was capable as a free being of avoiding it; or whether he was subject to determining forces in and about him which made him less an agent than a victim; how far he was responsible for his action; whether, in the eternal justice of things, his responsibility should be shouldered by him alone or shared by the society of which he forms a component part—these are questions that scarcely ever troubled the minds of ancient penologists or administrators. They were problems excluded from practical politics and assigned to philosophers for their solution in ethics or metaphysics.

These ancient ideas, based on a conception of what may be called demo-theocracy, made the administration of punishment depend on the will of the sovereign. It was not, however, at the mercy of his whims and caprices. The laws of the State were the quintessence of the wisdom of the times and represented the sense of the people and their ideas of right and wrong—in other words, what we may almost regard as the social conscience of the time and the country. Added to all this was the divine or semi-divine authority of the King, who was the very embodiment of justice and righteousness, and vested with the power of dispensing punishment with an even hand.

Thus we find in all ancient literature a very high place accorded to punishment, without any inquiry or investigation into the fundamental principles that underlie crimin-

ality. The older systems of law and jurisprudence take as their starting-point the necessity and efficacy of punishment. Properly analysed, the conception of punishment in these ancient law-givers is based on one or more of the following underlying ideas: vengeance, expiation, intimidation or deterrence, and, to a very limited extent, correction. It does not appear, however, that among the early thinkers there was much distinction drawn between these different elements that may exist in the theory of punishment. Vengeance and expiation are motives standing out in great prominence in the law of all Germanic countries. Intimidation is often present in the older systems, but is not always necessarily associated with the idea of vengeance.

3. DETERRENCE—THE SOVEREIGN IDEA IN THE PENAL LAW OF HINDU INDIA

The main characteristics of the ancient Indian system are the notions of intimidation, of expiation, and also, in a crude form, of correction, but there is no trace of the notion of vengeance. Intimidation is, however, the ruling idea and has as its origin the belief in the semi-divine character of the King. The King is regarded as the fountain of the divine authority and righteousness. Indeed, he is almost looked upon as punishment incarnate. No wonder that in this land, where the sovereign powers and forces of the spirit world took the form of incarnations, the principal power safeguarding law and order should also have been viewed as in the nature of an incarnation.

In the Śāntiparva of the Mahābhārata punishment is conceived as an entity, a being, almost a deity; thus it runs: 'Who is Penal Providence; what sort is he; how does he look, how does he work? What is his essence; how did he arise; what are his manifestations; how does he control? How, again, does he keep awake, maintaining

himself amongst the subjects? Who, again, remains awake, protecting this continuity (evolution)? Who, again, is recognized as the beginning of things; who a blessing designated as penal providence? Wherein did penal providence reside; what again, are intended to be his ways?'[1] The answer to the questions thus formulated is given in the next verse: 'Listen, Oh descendant of Kuru, what is penal sanction, which again is *Vyavahāra* (judicial proceeding)—on which indeed depends everything, it is the sole law.'[2] So also in the next: 'Punishment is so called in order that the righteousness of the king who is wide awake may not suffer extinction.'[3] The idea of divinity is brought out thus: 'Punishment is the mighty Visnu, the veritable Yajna (sacrificial rite), the Lord Narayana. He is called the great being bearing an eternal mighty form.[4] Thus punishment, the daughter of the Supreme Being under diverse appellations such as *Lakshmi* (Prosperity), *Niti* (Moral Ordinance), *Saraswati* (Learning), *Dandaniti* (Penal Ordinance), is made manifest in diverse forms and supports the Universe.'[5]

A similar view is to be found in the seventh chapter of

[1] Ko daṇḍaḥ kidṛśo daṇḍaḥ kimrūpaḥ kimparāyaṇaḥ |
Kimātmakaḥ kathaṃbhūtaḥ kathammūrtiḥ kathaṃ prabhuḥ || 5
Jāgarti cha kathaṃ daṇḍaḥ prajāsvahitātmakaḥ |
Kaścha pūrvāparamidaṃ jāgarti pratipālayan || 6
Kaścha vijñayate pūrvaḥ ko varo daṇḍasaṃjñitaḥ |
Kiṃśaṃsthaścābhaveddaṇḍaḥ kā chāsya gatiruchyate || 7

Chap. cxxi, headed *Rājadharmānuśāsana* (i.e. Duties ordained for the King) in Śāntiparva, verses 5–7.

[2] Śṛṇu kauravya yo daṇḍo vyavahāro yathā cha saḥ |
Tasminhi sarvamāyattam sa dharma iti kevalaḥ || 8

'*Vyavahāra*, or judicial proceeding, is that which by discriminating the good from the evil ministers to the virtues of both the people and the king and furthers their interest.'—Śukranīti, chap. iv, sec. 5, verses 7–8.

[3] Ibid., verse 9.

[4] Daṇḍo hi bhagavān Viṣṇuryajño Nārāyaṇaḥ prabhuḥ |
Saśvadrūpaṃ mahadbibhranmahān puruṣa uchyate || 23

[5] Tathoktā Brahmakanyeti Laksmīr Nītiḥ Sarasvatī |
Daṇḍanītirjagaddhātrī Daṇḍo hi bahuvigrahaḥ || 24

Manu-Samhita. Punishment is there regarded as springing out of the essence of the Lord of all creation and as the protector and preserver of order among all created beings. 'Verily, Punishment is the King. Punishment is the Person. Punishment is the Governor and Regulator of the State. The rishis regard punishment as the safeguard of the functions of the four orders.'[1]

Again, 'Punishment rules over all the subjects. Punishment is indeed the Protector. Punishment keeps awake while all are asleep. The wise know punishment to be Righteousness. Punishment inflicted with due discrimination conduces to the happiness of all subjects. But used with indiscretion leads to destruction.'[2]

Then we have an enumeration of the attributes of the King and the statement of the principle that the person in whom punishment is incarnate is the King. 'He is called the King and is the dispenser of punishment, and truthful; who uses it with discrimination, who is wise, who is versed in Dharmā, Kamā, and Artha.'[3]

'For the protection of all created beings and for his good

[1] Sa rāju purāṣo daṇḍaḥ sa netā śāsitā cha saḥ |
Chaturṇāmāśramāṇāṃ cha dharmasya pratibhūḥ smṛtaḥ ||
Manu, chap. vii, verse 17.

The four social orders referred to in the verse are: first and foremost, the Brāhmaṇas or the sacerdotal order; secondly, the Kshatriyas or the warlike order; thirdly, the Vaiśyas or the order of traders and merchants; and, lastly, the Śūdras or the menial order.

[2] Daṇḍaḥ śāsti prajāh sarvā daṇḍa evābhirakṣati |
Daṇḍaḥ supteṣu jāgarti daṇḍaṃ dharmaṃ vīdurbudhāḥ ||
Samīkṣya sa dhṛtaḥ samyak sarvā rañjayati prajāh |
Asamīkṣya pranītastu vināśayati sarvataḥ ||
Ibid., chap. vii, verses 18, 19. Cf. Śukranīti, chap. iv, sec. 1, verses 101–2: 'All the methods and means bear fruit through the King's policy of punishment. That is the great stay of virtues.'

Compare with this the modern dictum of Dean John H. Wigmore of the North Western Law School, U.S.A., that the deterrent theory is the 'King pin of the criminal law.'

[3] Tasyāhuḥ saṃpraṇetāraṃ rājānaṃ satyavādinaṃ |
Samīkṣyakāriṇaṃ prājñaṃ dharmakāmārthako vidaṃ ||
Manu, chap. vii, verse 26.

(the good of the King), God has created out of the supreme fiery essence his son punishment which is righteousness.'[1]

'It is also for fear of this punishment that all created things, mobile and immobile, in the enjoyment of their respective rights do not deviate from their respective duties in life.'[2]

4. PRINCIPLES PRESCRIBED FOR THE ADMINISTRATION OF PUNISHMENT

As regards the principle to be followed in the administration of punishment there appear to be general directions given which include not only a study of the objective circumstances of the offence but also the subjective limitations of the offender. Thus: 'The King shall ordain punishment to offenders according to the merits of each case after having carefully examined it with special reference to the place and time (of the offence) and the capacity and knowledge (of the offender).'[3]

This has to be read with verse 127 of chapter viii, which runs thus:

Anubandhaṃ parijñāya deśakālau cha tattvataḥ |
Sārāparādhau chālokya daṇḍaṃ daṇḍyesu pātayet ||

'After considering scientifically (*tattvataḥ*) causative tendencies or repeated inclinations (in the wrongdoer) and the effect of place and time, of capacity and incapacity, according to antecedents and consequents one should administer punishment.' This rendering is after the com-

[1] Tadarthaṃ sarvabhūtānāṃ goptāraṃ dharmamātmajam ||
Brahmatejomayaṃ daṇḍamasṛjat pūrvamīśvaraḥ ||
Ibid., chap. vii, verse 14.

[2] Tasya sarvāṇi bhūtāni sthāvarāṇi charāṇi cha |
Bhayādbhogāya kalpante svadharmānna chalanti cha ||
Ibid., chap. vii, verse 15.

[3] Taṃ desakālau śaktiṃ cha vidyāṃ chāvekṣya tattvataḥ |
Yatharthataḥ saṃpranayennareṣvanyāyavartiṣu ||
Ibid., chap. vii, verse 16.

mentary of Kulluka Bhaṭṭa, the learned commentator of Manu, who thus elaborates the verse: 'This is the parent verse regarding offences called punishable or not. The dispensation of punishment should be ordained everywhere following this explanation. In the context, *Anubandha* stands for repeated inclination or generating tendency. Whatever (or whoever) induces him to that act, fully knowing that (or him)—whether (he does it) owing to the hunger of his relations, or the company of religious associations or addiction to wine, gambling, &c., or to the prompting of mistaken ideas, or with his own will guided by others—these are instances of *Anuvandhaḥ*. *Deśa* means village forest—wilderness—water—mother-land—land of birth, &c. *Kāla* means night, day, &c., times of plenty and scarcity, childhood, youth, &c. *Sāra* means capacity and incapacity, riches and poverty; *Aparādha* may be of eighteen kinds. Having carefully decided all this according to antecedents and consequents, one should so ordain punishment, that established order may not fail.'[1]

The above commentary of Kulluka Bhaṭṭa seems almost echoed in the commentary of Blackstone: 'The age, education, and character of the offender; the repetition (or otherwise) of the offence; the time, the place, the company wherein it was committed; all these, and a thousand other incidents may aggravate or extenuate the crime.'[2]

The 128th verse expresses the solemn responsibility

[1] Uktānuktadaṇḍyeṣvaparādheṣu mātṛkāślokoyam | Etadarthānusāraṇena sarvatraṃ daṇḍakḷptiḥ kartavyā | Tatra paunaḥpunyenapravṛttiranubandhaḥ pravṛttiḥkaraṇaṃ vā | Anubadhyate prayujyate yena tasmin karmaṇi taṃ parijñāya kimayamātmakutumbakṣudabasāyenadharmatantrasanghena vā atha madya-dyūtādiśauṇḍatayā tathā pramādādbuddhipūrvaṃ vā paraprayuktasvechchhayāvetyādiranubandhaḥ | Deśo grāmāraṇyagṛahajalajanmaprasavabhumyādiḥ | Kālo naktaṃ divādiḥ | Subhikṣadurbhikṣabālyayauvanādiḥ | Sāraḥ śaktyaśaktī āḍhyatvadāridrye aparādhoṣṭadaśānāṃ padāṇāmanyatamaḥ | Etatsarvaṃ paurvāparyeṇa nirūpya tathā daṇḍaṃ pātayet kūryāt yathā sthitiḥ sāmsārikī na bhraśyatīti.—Kulluka (9th century).

[2] Blackstone's *Commentaries on the Laws of England*, vol. iv, pp. 15–16.

which rests on the King and the retribution which follows his failure to do his duty. 'Punishing unjustly in this world ruins reputation and destroys fame. Elsewhere also it deprives one of heaven and hence it should be avoided.'[1]

5. EARLY GLIMPSES OF THE PROBLEMS OF CRIMINAL SOCIOLOGY

The last few verses are an early expression of the modern enlarged idea of *la science penitentiaire* which directs its attention not only to the objective features of the offence but also to the subjective limitations and predeterminations of the offender. The trained criminologist considers the 'capacity' or 'incapacity' of the offender, and regards the offence from an entirely new standpoint. That all this can fairly be read into these ancient texts is perhaps too much to claim. For the idea of individualization of punishment with all its implications has taken centuries to be evolved. In the sphere of practical application, even at the present day, it is looked upon almost as a heresy. Hence it would be idle to say that the conception was present in the mind of the ancient Indian lawgiver: but there can be no doubt that in an embryonic form the main essentials of the idea were visible.

It is most interesting to note that in dealing with the question of capital punishment the ancient Hindu writers show clearly they were keenly alive to some of the greatest problems of sociology and penal philosophy that confront us to-day. Says Śukrāchārya: 'One should not kill living beings—this is the truth of Śruti. So the King should carefully avoid capital punishment and restrain by deten-

[1] Adharmadaṇḍanam loke yaśoghnaṃ kīrtināśanam |
Asvargyaṃ cha paratrāpi tasmāttatparivarjjayet ||
Manu, chap. viii, verse 128.

tion, imprisonment and repression.'[1] Elsewhere is to be found the opposite principle derived also from Śruti: 'According to the dictates of Śruti the execution of bad men is real *Ahiṃsā*.'[2]

But it is in the Mahābhārata that there is found a really illuminating discourse on the expediency or otherwise of capital punishment. It is in the form of a dialogue between King Dyumutsena and his son Prince Satyabān. A number of individuals having been brought out for execution at the command of his father, Prince Satyabān protested and gave vent to his feelings as follows: 'Sometimes virtue assumes the form of sin and sin assumes the form of virtue. It is not possible that the destruction of individuals can ever be a virtuous act.' Dyumutsena observed: 'If the sparing of those who should be killed be virtue, if robbers be spared, O Satyabān, then all distinction (between virtue and vice) would disappear.' Satyabān thereupon rejoined: 'Without destroying the body of the offender the King should punish him as ordained by the Scripture. The King should not act otherwise, neglecting to think properly upon the character of the offence and upon the science of morality. By killing the wicked, the King kills a large number of innocent men. Behold by killing a single robber his wife, mother, father and children are all killed. When injured by wicked persons the King should, therefore, think seriously on the question of punishment. Sometimes a wicked man is seen to imbibe good conduct from a pious person. It is seen that good children spring from wicked persons. The wicked, therefore, should not be uprooted. The extermination of the wicked is not in conformity with eternal practice. By punishing them gently, by depriving them of all their riches, by chains and imprisonment, by disfiguring them,

[1] Śukranīti, chap. iv, verses 184–6.

[2] Chap. iv, sec. 1, verse 103.

they may be made to expiate their offences. Their relatives should not be punished by the infliction of capital sentences on them.'[1]

In this interesting speech three objections are formulated against capital punishment. First, by punishing the offender the King punishes other people who are admittedly innocent, namely his relations and dependants. Secondly, it removes all hope of correction. Thirdly, it destroys the possibility of his begetting children who might become good citizens. These are undoubtedly some of the most telling arguments that have been brought forward against capital punishment even up to the present day.

[1] Adharmatāṃ yāti dharmo yātyadharmaścha dharmatāṃ |
Vadho nāma bhaveddharmo naitadbhavitumarhati ||
Dyumatsena uvācha |
Atha chedavadho dharmo dharmaḥ ko jātuchidbhavet |
Dasyavaśchenna hanyeransatyavānsaṃkaro bhavet ||
Mamedamiti nāsyaitatpravarteta kalau yuge |
Lokayātrā na chaiva syādatha chedvettha śaṃsanaḥa ||
Satyavānuvācha |
Yo yasteṣāmapacharettamāchakṣīta vai dvijaḥ |
Ayaṃ me na śṛṇotīti tasminrāja pradhārayet ||
Tattvābhavena yachchhāstraṃ tatkuryānnanyathā vadhaḥ |
Asamīkṣyaiva karmāṇi nītiśastraṃ yathāvidhi |
Dasyūnnihanti vai rājā bhūyaso vāpyanāgasaḥ ||
Bhāryā mātā pitā putro hanyante puruṣeṇate |
Pareṇāpakṛto rājā tasmātsamyakpradhārayet ||
Asādhuśchaiva puruṣo labhate śīlamekadā |
Sādhośchāpi hyasādhubhyaḥ śobhanā jāyate prajā ||
Na mūlaghātaḥ kartavyo naiṣa dharmaḥ sanātanaḥ |
Api khalvavadhenaiva prāyaschittaṃ vidhīyate ||
Udvejanena bandhena virūpakarṇena cha |
Vadhadaṇḍena te kliśyā na purohitasaṃsadi ||
Śāntiparva, chap. cclxxiii, verses 4–6, 8–13.

II

THE ROOT IDEA OF PUNISHMENT

1. EARLY HISTORY OF PENAL LAW IN GERMANIC SYSTEMS

THE writings of ancient Indian lawgivers referred to in the foregoing chapter draw little or no distinction between moral and legal culpability. Indeed, in ancient systems of law the distinction is practically unknown. So, too, early English law like the early law of all Germanic tribes confused sins, moral wrongs, breaches of custom and breaches of law; and made no difference between those that were calculated to do public harm and those that affected individuals only. Thus in the differentiation between moral and legal, private and public wrongs, all early law stands on very much the same plane. The basic principle, however, of the rules for regulating conduct varies from system to system. For instance it may be vengeance or expiation in one, deterrence or intimidation in another. In the Germanic systems, broadly speaking, it is vengeance, while in the Hindu system dealt with in the foregoing chapter it is deterrence. Not that there is a complete absence of the element of deterrence in the early Germanic systems any more than there is a complete absence of the element of vengeance in the early Hindu systems. But it may be safely asserted that the dominant principle is vengeance in the former and deterrence in the latter.[1] The actual forms of punishment in which the idea

[1] There is another idea that often expresses itself in early punishments and that is the idea of elimination of the offender from society to avoid contamination. This principle underlies the infliction of death penalty. Exile or outlawry in the ancient systems served the same end, and in its more modern form it is banishment. See Parsons, *Crime and the Criminal* (Knopf, New York), p. 256. 'The original purpose of infamous punishment was to isolate the offender. It was a form of banishment; at least it was designed to produce the same result that banishment did, namely, place social distance between the offender and the

manifests itself in the one may not be far different from those in the other. To the superficial observer it may often indeed be difficult to discern any great difference of point of view. But the difference is there all the same.

'As regards the malefactor,' says Professor Maitland, speaking of the Germanic systems, 'the community may assume one of four attitudes: it may make war upon him; it may leave him exposed to the vengeance of those whom he has wronged; it may suffer him to make atonement; it may inflict on him a determinate punishment, death, mutilation or the like.'[1] In this sentence Professor Maitland has summarized the whole history of punishment, generally, and among the Germanic races in particular. The first of the four 'attitudes' results in outlawry,[2] the second and third result in the systems of *wér* and blood-feud,[3] of *bót* and *wíte*; the third, in particular, in a growing conception of betterment or compensation, or of composition with the evildoer which sprang out of *bót* and *wíte*,[4] and the fourth in the later idea of afflictive punishment

law-abiding citizen.' Ibid., pp. 281–2. See also Wine, *Punishment and Reformation* (Thomas Y. Crowell Co., New York), pp. 85, 86. Chapter v of Dr. Wine's book, which is headed 'Intimidation and Torture', gives a most instructive account of the variety of gruesome punishments which in the name of retributive justice have been inflicted in different ages and countries down to recent times.

[1] *The History of English Law*, by Pollock and Maitland, vol. ii, p. 449.

[2] 'The evidence which comes to us from England and elsewhere invites us to think of a time when law was weak and its weakness was displayed by a ready recourse to outlawry. It could not measure its blows; he who defied it was outside its sphere; he was outlaw. He who breaks the law has gone to war with the community, the community goes to war with him. It is the right and duty of every man to pursue him, to ravage his land, to burn his house, to hunt him down like a wild beast and slay him.' Ibid., vol. ii, p. 449.

[3] 'From many ages and many quarters of the globe archaeologists and travellers are bringing together materials for the history of *wér* and bloodfeud while as regards our own Teutonic race a continuous and a well-proved tale can be and has been told.' Ibid., p. 448.

[4] Early Irish law also recognized a body price or compensation and an honour price for which the family or tribe of the offender was collectively liable. There is no clear analogue for the Saxon *wite* or fine to the chief.

meted out by the State on behalf of the individual and of the society wronged. The last survives to the present day.

It is not within the scope of this work, nor is it necessary, to deal in detail with the history of these different stages. Suffice it to say that the fundamental idea underlying these gradual developments is pre-eminently the idea of vengeance, retaliation, retribution. This principle of vengeance is not restricted to animate nature. It applies even to things that have done harm, specially to those that have caused death. Early law knows no such thing as accident. A is boiling water: in his absence C's child enters and stands by the kettle which boils over, scalding the child to death. The relatives pursue A, who flies to B's house. An affray ensues and B chances to kill his own nephew. A is held liable for the death of the child and B for the death of his nephew. Again, A's sword is hanging in B's house. C knocks the sword so that it injures D. A is liable, for his sword did the harm. If a man is lopping a tree and a bough falls on him so that he dies, the tree must be cut down. If he fall into a well and be killed, the well must be filled up. Out of this principle of vengeance is gradually evolved the secondary idea of compensation. Early Norman law, itself based largely on status, had a complete tariff fixing the value of each man's life or limb, so that if an injury were done the wrongdoer had to pay a *bót* varying with the rank and social position of the injured person. 'In the simplest case [of homicide] there is the *wér* of the slain, varying with his rank, to be paid to his kin; there is the *manbót* to be paid to his lord, and this varies with the lord's rank; there is the *wíte* to be paid to the king or some lord who has regalia.'[1] As an illustration of the combination, in one institution, of the principles both of retribution and compensation we have the Deodand. Until the middle of the last century it was compulsory in every

[1] Pollock and Maitland, *History of English Law*, vol. ii, p. 458 (1911 edition).

indictment of murder to state the value of the weapon. This was the modern survival of the surrender of the weapon, which originally was given up to the dead man's relatives; its value was then assessed and the sum paid to the Church; and finally its value went to the State.

2. LEX TALIONIS

The predominant idea running through all the successive stages is liability for the wrongful act, irrespective of the mental factor involved in the act. Intentional and unintentional acts are not distinguished. Both stand on the same plane in the estimation of the power meting out the punishment, whether the holder of that power is an individual, the tribe, or the State. For wherever there is an offence there must be a corresponding punishment to equalize or neutralize it. Indeed the key-note of the whole system is nothing more nor less than the *lex talionis*.

The *lex talionis* is as old as the world itself. As expressed in the Mosaic law it sounds harsh to modern ears: 'Thou shalt give life for life, eye for eye, tooth for tooth, foot for foot, burning for burning, wound for wound and stripe for stripe.' The sense of harshness it gives is perhaps heightened by contrast between the Mosaic dispensation and the Christian dispensation which followed with its message of love and forgiveness. In the realm of juristic thought, however, there is a profound significance in the law of vengeance or retaliation. Underneath it is the deep-seated sentiment of justice, the essence of which is the idea of equality. It is this basic idea that stands out in its primitive frankness in the *lex talionis*. Given an offence, there must be a punishment. The punishment, as it were, works off by the suffering that it inflicts on the wrongdoer the suffering caused to the aggrieved party. To work it off adequately the suffering that the punishment inflicts on the wrongdoer must be equal in kind and degree to the

suffering that he may have caused by his offence. There are really two principal things that the sense of justice demands: first, equality of punishment for all, and secondly, equality between the crime and the punishment in point of the suffering inflicted.

As to the first, in this estimate of equality and in the administration of this equal justice to all alike the *lex talionis* fails to take into account the many factors that of themselves introduce inequality. The so-called equality is more often than not a fiction. For whereas the *lex talionis* takes note only of the obvious objective factors, that is, the crime itself and its immediate surrounding circumstances, there are certain other factors hitherto disregarded, namely anthropological, physical, social, and psychological, which bear upon the personality of the offender, rather than the offence itself, and which with the progress of juristic thought are taken into account and disturb the mathematical equality of the Mosaic law. The principle that all men are equal in the eye of law and of justice and that, therefore, they must be punished in the same way for the same offence has been severely shaken by the gradual and increasing appreciation of the physio-psychical, hereditary, and environmental factors that may have influenced the person to be punished. Hence the onslaughts on the so-called classical school which are the result of later developments of criminological theory and which will be dealt with later on in these pages. It should, however, be remembered that the classical school had its own characteristics suited to the particular stage at which it appeared. The science of criminology had not yet undertaken the positive and methodical observation of the primary factors of crime. It is in vain, therefore, that we look for those truths in the classical school which, from its own nature, it cannot reveal. As to the other aspect of the sense of justice which demands equality or similarity, as far as

possible, between the offence and the punishment, it has many grotesque examples in old systems:

'If a man has caused the loss of a patrician's eye, his eye one shall cause to be lost. If he has shattered a patrician's limb, one shall shatter his limb. If a man has made the tooth of a man that is his equal fall out, one shall make his tooth fall out. In some cases, this is carried out in a way that appears ridiculous. If a man kills another by falling from a tree upon him, he shall be killed by one of the relatives of the deceased falling out of a tree upon him.'[1] To satisfy the idea of equality it is further ordained that if the remaining eye of a one-eyed man be put out, the wrong can only be righted by putting out both the eyes of the offender. The same idea underlies the punishment of emasculation for the ravisher, the brank or metal gag, frequently called the scold's or gossip's bridle, for the shrew or the tell-tale, the ducking-stool for the ill-tempered, and piercing the tongue with red-hot iron for the blasphemer.[2] However imaginative and ingenious these punishments may be, man has fortunately outlived the belief in their efficacy or propriety, and a reaction has now set in with the dawn of a new idea, namely, that penalties are intended not merely to punish but to reform the culprit.

The same idea of equality is expressed in a somewhat different form by Aristotle. While discussing what he calls 'corrective justice' he seems to think that the essence of it consists in restoring the equality or the balance which is disturbed by the offending act. He observes:

'But the "just" which arises in transactions between men is fairness in a certain sense, and the "unjust" unfair,

[1] Hammurabi's Code referred to in *Morals in Evolution*, by L. T. Hobhouse, p. 74. See also Edwin H. Sutherland, *Criminology* (Lippincott, Philadelphia), p. 27.

[2] See Gillin, *Criminology and Penology* (Century Co., New York), pp. 304–5, and Parmelee, *Criminology* (Macmillan Co., New York), p. 364, where these and allied punishments are called 'poetic penalties'.

only not in the way of geometrical proportion but of arithmetical. Because it makes no difference whether a robbery, for instance, is committed by a good man on a bad or by a bad man on a good, nor whether a good or a bad man has committed adultery: the law looks only to the difference created by the injury and treats the men as previously equal, where the one does, and the other suffers, injury, or the one has done, and the other suffered, harm. And so this "unjust", being an inequality, the judge endeavours to restore to equality again, because really when the one party has been wounded and the other has struck him, or the one kills and the other dies, the suffering and the doing are divided into unequal shares; well, the judge tries to restore equality by penalty, thereby taking from the gain.

'For these terms gain and loss are applied to these cases, though perhaps the term in some particular instance may not be strictly proper, as gain, for instance, to the man who has given a blow, and loss to him who has received it; still, when the suffering has been estimated, the one is called loss and the other gain.

'And so the equal is a mean between the more and the less, which represent gain and loss in contrary ways (I mean, that the more of good and the less of evil is gain, the less of good and the more of evil is loss): between which the equal was stated to be a mean, which equal we say is "just": and so the corrective just must be the mean between loss and gain.' But Aristotle is not slow to perceive that this equipoise is not always capable of achievement:

'There are people who have a notion that reciprocation (or retaliation) is simply just, as the Pythagoreans said: for they defined the just simply and without qualification as "that which reciprocates with another" (i.e., an eye for an eye). But this simple reciprocation will not fit on either

to the "distributive just", or the "corrective just" (and yet this is the interpretation they put on the Rhadamanthian rule of the just: "If a man should suffer what he hath done, then there would be straightforward justice"), for in many cases differences arise: as, for instance, suppose one in authority has struck a man, he is not to be struck in turn; or if a man has struck one in authority he must not only be struck but punished also. And again, the voluntariness or involuntariness of actions makes a great difference.

'But in dealings of exchange such a principle of justice as this reciprocation forms the bond of union; but then it must be reciprocation according to proportion and not exact equality, because by proportionate reciprocity of action the social community is held together. For either reciprocation of evil is meant, and if this be not allowed it is thought to be a servile condition of things: or else reciprocation of good, and if this is not effected then there is no admission to participation (i.e., of service) which is the very bond of their union.'[1]

So deep-seated is the idea of equality between crime and punishment that we find, as late as Kant and Hegel, the idea reasserting itself. Kant speaks of 'the right which the sovereign has painfully to afflict the subject by reason of a transgression of the law.' Hegel analyses it further and in his *Philosophy of Right* rationalizes it thus: 'Punishment is only the manifestation of crime, the second half, which is necessarily pre-supposed in the first.' 'Retribution is the turning back of crime against itself. The criminal's own deed judges itself.' Again: 'Since violence or force in its very conception destroys itself, its principle is that it must be cancelled by force.' 'Hence it is not only right but necessary that a second exercise of force should annul and supersede the first.' 'The criminal act is a negation, and punishment is the negation of a negation.'

[1] Aristotle, *Ethica Nicomachea*, book v, chaps. 4–5.

Hegel rests his view upon the assumption that violence alone can undo the effect of violence; that the criminal act is an act of violence on the social order and hence an act of unreason; and it can be negatived only by another act of violence and unreason, namely, punishment, which he calls 'the other half', or counterpart, of crime. All this looks as correct and precise as an algebraic equation. But it lacks the quality of convincingness, as the assumptions, though symmetrical, are by no means self-evident. It has to be proved that violence cancels violence and that unreason by annulling unreason re-establishes reason. Logically, the negation of a negative may produce an affirmative. But though two negatives make an affirmative, it is difficult to realize how two acts of violence can re-establish the *status quo ante*, how two acts of unreason can produce the happy result of re-establishing reason. Nor is it at all clear how punishment can be visualized as the other half of crime unless by one who has an inveterate love of symmetry.

Despite Hegel, however, the idea of justice which is embodied in the *lex talionis* has developed with the passing of time. The law of retaliation represents the conception of punishment in an inchoate state of homogeneity. On the other hand, the present-day penal conceptions represent a growing differentiation and integration. The underlying principle that leads to this gradual differentiation and integration is Purpose. Indeed, the outstanding contribution to present-day thought is the comprehensive idea of purpose in law which is dealt with in the next chapter.

III

THE POWER OF PURPOSE IN LAW

1. IHERING'S THREEFOLD MAXIM

MUCH criticism, informed and uninformed, has been levelled against the conception of 'Purpose in Law' (*Der Zweck im Recht*). Ever since Von Ihering promulgated the doctrine, jurists and philanthropists have, according to their individual predilections, assailed it or accepted it, either in part or in its entirety. Yet it cannot be denied that by its comprehensiveness it is entitled to a foremost place in the philosophy of law. 'The position of a person', says Von Ihering, 'depends upon three conditions, the two from which he derives his right, and a third upon which the world bases his duty to it:

I exist for myself;
The world exists for me;
I exist for the world.

Upon these three concise statements rests the entire scheme of law, and not merely that of law but the whole ethical world-order, our private life, life in the family, business relations, society, the State, international intercourse, the mutual relations of peoples, those living contemporaneously as well as those long departed.'[1] On a little reflection it will appear that the operation of this threefold maxim, as understood by Ihering, involves and comprehends all the diverse phases of right and duty which relate to domestic and social, national and international life, and which relate not only to the life of the present and the future but also to that of the past.

[1] *Law as a Means to an End*, being a translation of Von Ihering's *Der Zweck im Recht*, by Isac Husik (Modern Legal Philosophy Series, Boston Book Company, Boston, 1913), p. 51.

The first two, 'I exist for myself' and 'the world exists for me', almost sound like pure egoism and are reminiscent of Hobbes and his group. It is even possible, with but a slight straining of the imagination, to discern in them the utilitarianism of Bentham, Mill, and the other hedonists of the English school; for, in the long run, as they would say, the surest way of securing one's own happiness is to secure the greatest happiness of the greatest number. True, I exist for myself and the world exists for me. But as the world consists not only of me but of other individuals who must also shape their conduct on the same twofold doctrine there would be an inevitable clash between me, on the one hand, and the manifold me's that make up the world on the other. In order to reconcile this conflict—this paradox of hedonism—the utilitarian declares that one's own happiness is involved in and secured by the greatest happiness of the greatest number. Whether in reality it is so secured or not is a matter on which moralists have agreed to differ. It is justly regarded as one of the antinomies which utilitarianism has failed to solve. But one thing is clear, that, in declaring that the happiness of the individual is involved in and secured by the greatest happiness of the greatest number, the utilitarian, though not indeed an egoistic hedonist, remains yet a hedonist. His fundamental position and point of view is still essentially hedonistic. The fact that Ihering links up the first two maxims with the third, 'I exist for the world', at once reveals his threefold maxim as standing on a plane altogether different from that of hedonism. I know of no hedonist, of the English or any other school, who, remaining true to his principles, could subscribe to the doctrine 'I exist for the world'. For him to make this declaration would be to adopt a standard inconsistent with his theory of pleasure and therefore invalid.

What, then, is this threefold maxim of Purpose? It

lays down once for all that the purpose of law is to carry out the dictates of the social conscience but that in doing so the self, or the individual, inevitably comes into the reckoning. 'The individual withers and the world is more and more' is the old-world maxim. The threefold maxim brings into prominence the harmony of the claims of the individual and of the world, the furtherance of which is the purpose and fruition of law.[1]

2. DISCERNMENT OF PURPOSE IN THE HISTORY OF LAW

It is this purpose which is manifested in legal institutions according to the genius of men and nations in different ages and countries. The purpose of law should be to uphold the rights of the individual as well as the rights of the world or the State. Furthermore, its purpose should not only be to respect and protect the rights but to assist in their evolution. True, this comprehensive purpose has not always inspired the making of law. The preponderance of one section or another of society has often

[1] 'Our whole culture, our whole history, rests upon the realization of individual human existence for the purposes of the whole. There is no human life which exists merely for itself, every one is at the same time for the sake of the world; every man in his place, however limited it may be, is a collaborator in the cultural processes of humanity. Even if he is the most insignificant labourer he takes part in one of its problems and even if he does not work at all, he helps along in his everyday speech, for by doing this he helps to keep alive the words of the language handed down to him, and transmits them in its turn. I cannot imagine a human life so poor, so devoid of content, so narrow, so miserable that it is not of some good to some other life; even such a life has not seldom borne the world the richest fruit.' *Law as a Means to an End*, pp. 59–60. Again: 'The motives which prompt such social action by the individual are of two kinds. The first is egoism, with which we are already familiar. The means by which the State and society gain the mastery over this motive are reward and punishment. The second is that which contains in itself the solution of our problem of self-denial. It is the feeling on the part of the agent of the ethical destiny of his being, i.e. his feeling that existence was given to him not merely for himself but also for the service of humanity. In so far as the individual obeys this feeling and thereby realizes the higher purpose of his being he asserts himself. I shall, therefore, designate all action coming under this point of view as ethical self-assertion of the individual.' Ibid., p. 45.

led to the advancement of the purposes of that section, to obtain for itself political power rather than to further those purposes which would subserve the interests of the community in general.[1] With this reservation it may well be asserted that in the history of all nations is illustrated the sovereign purpose of the construction of law and legal institutions. As in penal law so in other departments it is purpose that has been dominant. Tell us what your purpose is and we tell you what your law must be. Tell us what your law is and we tell you what purpose lies behind it. If your purpose be to uproot heresy and to establish the supremacy of the Catholic faith at all costs, you must have the horrors of the Inquisition and all that lawless law that came in its train. If it be to break down the authority of the nobles, the Church, and the State and to enthrone *liberté*, *fraternité*, *égalité*, you must have a new set of laws calculated to visualize and actualize that condition. If your purpose be to remove illiteracy at all costs, you must have legislation for compulsory education. If your purpose be to encourage freedom of speech, your law is bound to relax the fetters on the press. If your purpose be to let only one voice—that of the Fascist—be heard, your law will as surely gag all but the Fascist press. If your pur-

[1] Thus Blackstone, speaking more particularly of criminal law, observes that 'either from a want of attention to these principles in the first concoction of the laws and adopting in their stead the impetuous dictates of avarice, ambition and revenge; from retaining the discordant political regulations which successive conquerors or factions have established in the various revolutions of Government; from giving a lasting efficacy to sanctions that were intended to be temporary and made (as Lord Bacon expresses it) merely upon the spur of the occasion; or from, lastly, too hastily employing such means as are greatly disproportionate to their end in order to check the progress of some very prevalent offence: from some, or from all, of these causes it hath happened that the criminal law is in every country in Europe more rude and imperfect than the civil'. *Commentaries on the Laws of England*, vol. iv, p. 3.

'The laws against witchcraft, the long line of "blue laws", the laws affecting religious beliefs and many social customs, are well-known examples of legal and innocent acts which legislatures and courts have once made criminal.' *Crime, Its Causes and Treatment*, by Clarence Darrow, p. 2.

pose be to tax the people for money, there would be ship-money levied, and despite a Hampden to speak out for the rights of the people there would be seven out of twelve judges ready to give judgment for the Crown. If your purpose, again, be to check the encroachments by the Crown on the rights of the people, there would be the Long Parliament ready to declare ship-money illegal. Thus it depends on the social conscience of the time, and as that unfolds itself the law unfolds itself accordingly. Where the purpose is to preserve the prestige of the State regardless of the sufferings of the people, or their just protests, there will be a set of laws to answer that purpose. Where, on the other hand, the purpose of the law and of the State is, as it should be, based on the maxim 'I exist for myself, the world exists for me, and I exist for the world', it will easily lead to the recognition that greater than the might and majesty of the State is the self-realization of the individual upon which, in the long run, depends the self-realization of society. Without the last two the dignity and prestige of the State are as sounding brass and tinkling cymbal.

Reverting to penal law, the same truth compels recognition. In the primitive stage, if the purpose be vengeance, the law is shaped and moulded to carry out this purpose. Who can deny that the *lex talionis* has a purpose of its own? It may sound barbarous to modern ears; but, as we have seen, there is behind it the idea of equality—the craving for intellectual symmetry that underlies the sentiment of justice and finds manifestation in retaliatory laws. It is individual retaliation to begin with, then it becomes tribal, communal, or corporate; finally, in due course of development, the duty of retaliation is vested in an organized body, the State—all in accordance with a growing purpose manifested through these gradually changing institutions, which are but forms or modes adapted to carry out the

particular purpose in each of the stages. In English penal law there is witnessed this gradual differentiation of the primitive law through diverse stages—from individual retaliation to communal retaliation, from communal to State retaliation, and so on, till, by a strange amalgamation with the doctrine of the King's peace, certain wrongs emerge as breaches of the King's peace and give rise to 'pleas of the Crown'. This leads ultimately to a system of tabulated punishments for crimes which the State alone can inflict. Indeed, in Europe, the Declaration of Rights in 1789 may be said to mark the beginning of an orderly and methodical system of punishments based on the principle that 'the right to punish is limited by the law of necessity'. Then came the declaration by the Revolutionary Assembly in 1791 that 'penalties should be proportioned to the crimes for which they are inflicted, and that they are intended not merely to punish, but to reform the culprit'.[1]

[1] 'The Declaration of the Rights of man and the Decree of January 21, 1790, established new principles in criminal matters; only acts injurious to society were declared punishable and not wrongs consisting only in intent; the law could establish only penalties which were strictly necessary; this involved the abolition of the atrocious punishments of the "Ancien Régime". The same penalty was prescribed for all who committed the same offence, whatever their rank or condition; offences being personal, the family could not be attainted by a punishment inflicted upon one of its members. Penalties were proportioned to the offence and were divided into three classes: corporal and infamous, correctional, and municipal, corresponding to the grades of offence, crimes, correctional offences, and municipal offences; and corresponding also to the courts, the criminal court (judges and juries), the correctional police (justice of the peace and two assessors), and the municipal police (three judges chosen by the municipal officers and from amongst themselves). The penalties prescribed by the Code of September 25, 1791, unlike those of the "Ancien Régime" were neither perpetual, nor atrocious, nor arbitrary. The infliction of the death penalty was limited to decapitation (by the guillotine, March 20, 1792); there were to be no more mutilations, nor branding with red-hot irons, nor whipping; "amende honorable", civil death, and general confiscation disappeared. Through hatred of arbitrary punishments, fixed penalties were prescribed which did not permit the judge to take account either of aggravating circumstances or of extenuating circumstances. The right of pardon, regarded formerly as an application of justice reserved by

3. REFORM, THE PURPOSE OF PUNISHMENT

The birth of an idea in society is always to a certain extent shrouded in mystery. For its exact moment is difficult of discernment, while the period of gestation is long. Indeed it is almost impossible to specify how long the idea had been in the womb of time, what nourishment it received, or what factors in its environment sustained it through its ante-natal stage. The birth of the reformative idea of punishment in Europe is usually assigned to the end of the eighteenth century. That is perhaps due to the fact that the Declaration of Rights in 1789 and the declaration by the Revolutionary Assembly in 1791 are landmarks which give the clearest indication of a definite formulation of the principle that the right to punish is limited by the law of necessity, and that penalties are intended not merely to punish but to reform the culprit. Although it may thus be convenient to consider the end of the eighteenth century as marking the advent of the idea of reform as the purpose of punishment, yet there is no doubt that the idea had seen the light much earlier. The prison for women at Amsterdam built as far back as 1593, the prison for young prisoners built at Rome in 1704 by Pope Clement XI, and called the Hospital of St. Michael, and the famous cellular prison at Ghent built by Villain XIV[1] all testify to the urge of the reformative idea.

the King and consequently exercised by him, was abolished, but the heaviest penalties like putting in irons and imprisonment were no longer perpetual. Conversely, rehabilitation, which was only a favour during the "Ancien Régime", became a right.'—Jean Brissaud, *A History of French Public Law*, translated by James W. Garner (The Continental Legal History Series, John Murray, London, 1915), sec. 504, p. 565.

[1] In fact Villain has been called the father of modern penitentiary science and his prison foreshadowed some of the present-day methods of prison reform, such as selection of prison industries calculated to offer means of honest livelihood to prisoners after discharge; allowing prisoners a percentage of their earnings during the term of imprisonment and retaining a part so as to be available to them at their discharge; discipline; classification of prisoners,

But the closing years of the eighteenth century were remarkable for the manner in which hitherto unseen forces united to introduce a new era. Of these some only require mention.

It must be remembered that Mirabeau contributed not a little at this juncture to the growth of the reformative idea by his prophetic report on prisons, in which he not only regarded them as *maisons d'amélioration*, but foretold many of the present-day principles of penitentiary reform such as the efficacy and dignity of labour, the necessity of separation, the need for securing co-operation of the culprit by means of rewards based on the 'mark' system, the expediency of conditional licence, and the indispensability of aid-on-discharge. Nor should we forget the effect of Beccaria's famous treatise *Crimes and Punishments*, and the influence of the French philosophers and encyclopaedists that leavened the thought of the eighteenth century, not to speak of Jeremy Bentham, whose writings were saturating the philanthropic thought not only of England but also of the Continent.

Equally epoch-making was the work of Howard, who, from an angle markedly different from that of Beccaria, and with a method more practical than speculative, laboured in unconscious affinity with Beccaria against the manifold evils of the prison system of the day, and the needless infliction of pain by which it was characterized.

But behind all these movements lay the unconscious influence of the Church of the Middle Ages and of the canonical law, which saw in solitary confinement not only the way to expiation, but pre-eminently the way to penitence and reform. Soon there appears the ecclesiastical

medical and spiritual assistance, and, last but not least, power given to the prison authorities to recommend prisoners for pardon and commutation of sentence in appropriate cases as a reward for reform, thus anticipating the 'indeterminate sentence'.

idea that silence and solitude, by inducing reflection, lead to reform, and it receives notable recognition in what has been called the Pennsylvania system of cellular imprisonment. It is not the purpose of this treatise to discuss the respective merits and demerits of the two rival systems—the Pennsylvania and the Auburn. The history of that rivalry is almost of antiquarian interest at the present day. But whether it be the 'separate' system associated with the name of Pennsylvania, or the 'congregate' system associated with that of Auburn,[1] it is clear that the paramount purpose of both was reform, and the experiments on the 'cellular' and the 'associated' systems will go down to posterity as milestones on the path towards the reformative method.

4. SOCIAL DEFENCE, THE LARGER PURPOSE OF PENAL LAW

But mere reform of the individual criminal is not enough. With the idea of reform has come slowly but surely into the realm of penology a new point of view, resulting from the study of the causes and conditions of crime, i.e. of all anti-social conduct. The inquiry has gradually widened, embracing different spheres of knowledge, so that biology, physiology, sociology, economics, psychology, mental pathology, psychiatry, anthropometry, and all sciences connected directly or indirectly with the springs of human activity have now become necessary aids

[1] 'The two rival systems are known all over the world as the Pennsylvania and Auburn systems, though the first did not originate in Pennsylvania, nor the second in Auburn, and though neither is now followed, at least in its entirety, as conceived by its originators, either there or here. The general adoption of these distinctive names is nevertheless an admission, honourable to the American nation, that it was on the free soil of the United States, under the influence of democratic ideas, that the penitentiary system received its earliest and best expression, as a humane reaction against former tyranny and oppression in the name of criminal justice.' *Punishment and Reformation—A study of the Penitentiary System*, by Dr. Frederick Howard Wines, p. 162.

to a knowledge of penology and criminal jurisprudence. For the individual does not come to life with a *tabula rasa* for a mind, but comes as the inheritor of a physical and mental constitution which may be sound or defective, and which is subject to the influences of the environment wherein he is called to act.[1] It is these internal and external factors, their play and interplay, that call forth actions which the law labels either right or wrong. Libertarian or determinist—believer in free will or in 'Fate'—there is one point on which both are agreed, namely, that it is the individuality of the wrongdoer—by which is meant his physical and mental character, however evolved—that, subject to the limitations imposed on it by environment, accounts for all his actions. To reform a wrongdoer, therefore, it is necessary to analyse the causes of his wrongdoing—the etiology of crime. This involves an examination of his physical and psychical make-up—i.e. his heredity, his antecedents, education, economic condition, temperamental characteristics, and the other elements which contribute to his character.

But that is not all. Apart from research into the causes and circumstances that produce crime and into the practical measures whereby the criminal may be cured and rehabilitated, there is another sphere of inquiry that has been opened up recently and which deals with the prevention or prophylaxis of crime. It is this development that reveals clearly the widening of the purpose of law in the twentieth century.

The purpose of law is no longer the mere reform of the criminal. It has now developed into a *défense sociale*, a defence of society, which embraces all the latter's aims.

[1] 'Individual, physical, and social factors, heaven and earth, as Goethe would say, have determined the birth of the (male) offender and of the modern school of criminal law.' *Modern Theories of Criminality*, by C. Bernaldo de Queros, sec. 5, p. 10 (The Modern Criminal Science Series, Little Brown & Co., Boston, 1912).

The defence of society is regarded as the one objective to which criminal legislation and criminal therapy are directed—such defence involving not only the reform or rehabilitation of the members infected by the anti-social germ,[1] but the introduction into society of preventive and hygienic measures to make it secure from the germ's ravages. These measures are necessarily negative or destructive, as well as positive or constructive.

5. THE OLD AND THE NEW CONCEPTION OF 'PROTECTION OF SOCIETY'

That the conception of *défense sociale* includes much more than the reform of the criminal has slowly been realized by penologists. The idea of the defence or protection of society through penal law finds expression in the literature of most countries. But its significance has been largely increased during the last fifty years and it has now a specialized meaning in penology. As an illustration of the ordinary meaning which, in the last century, was attributed to the phrase 'defence of society', there is the report of the International Committee (representative of twenty nations) at the London Congress of 1872 on the question of the moral regeneration of the prisoner: 'Recognizing as the fundamental fact that the protection of society is the object for which penal codes exist and the

[1] The word 'anti-social' has its wider implications which would readily come within the scope of preventive and hygienic measures, if only modern society were prepared to deal with them. Those implications are pointed out by a criminal lawyer of great eminence thus: 'Some seek to avoid the manifold difficulties of the problem by saying that a criminal is one who is "anti-social". But does this bring us nearer to the light?' And again: 'If the anti-social individual should be punished, what of many of the profiteers and captains of industry who manipulate business and property for purely selfish ends? What of many of our great financiers who use every possible reform and conventional catchword as a means of affecting public opinion, so that they may control the resources of the earth and exploit their fellows for their own gain?' Here is a severe indictment of the anti-social activities of individuals whom the law is loth to place in the category of criminals. See Darrow, *Crime, Its Causes and Treatment*, pp. 5–6.

treatment of criminals is devised, the Committee believes that this protection is not only consistent with but absolutely demands the enunciation of the principle that the moral regeneration of the prisoner should be the primary aim of prison discipline.' As Sir Evelyn Ruggles-Brise points out, 'The Congressists of 1872 did not say that reformation should be the primary aim of punishment but only of prison discipline. This is quite a different thing.'[1] In the same way, the phrase 'protection of society' has in the report a meaning very different from the *défense sociale* of the modern school. The one rests on the punitive view of criminal law, with the law regarded as a weapon against the criminal for defence or for securing reparation; while the other depends on *l'hygiène préventive*, the dominant policy of to-day, which results in a scientific handling of the social, psychological, educational, and economic issues, so that the germs of anti-social conduct are prevented from living and thriving in the social organism.

But in the report of the International Committee, cited above, the expression 'protection of society' is used with the older and more restricted meaning, for it denotes the punishment of those guilty of anti-social conduct and their reformation by such punishment through an enlightened method of prison discipline. The protection of society, or *défense sociale*, which is the aim of the modern positivist school, involves something more than mere reparation. 'The legislator', says Ferri,[2] 'on whom it devolves to preserve the health of the social organism, ought to imitate the physician, who preserves the health of the individual by the aid of experimental science, resorts as little as possible and only in extreme cases to the more forcible methods of surgery, has a limited confidence in the problematic

[1] *Prison Reform at Home and Abroad* (Macmillan & Co., London, 1924), p. 20.

[2] *Criminal Sociology* (Appleton & Co., New York, 1915), p. 133.

efficiency of medicines and relies rather on the trustworthy processes of hygienic science. Only then will he be able to avoid the dangerous fallacy, ever popular and full of life, which Signor Vacca, Keeper of the Seals, expressed in these words "The less we have recourse to preventive measures, the more severe ought our repression to be," which is like saying that when a convalescent has no soup to pick up his strength, we ought to administer a drastic drug. It is precisely on this point that the practical,rather than the merely theoretical, differences between the positive and the classical schools of penal law become evident. Whilst we believe that social reforms and other measures suggested by a study of the natural factors of crime are most effective in preventing crimes, legislators employing the *a priori* method of the classical school have for many years past been discussing proposed penal codes, whilst they permit criminality to make steady progress.' In other words, the defensive function of society should be moral and preventive, based on the natural laws of biology, psychology, and sociology.[1]

[1] 'Punishment which has professed to be such a simple and powerful remedy against all the factors of crime is, therefore, a panacea whose potency is far beneath its reputation.' Ibid., p. 93.

IV

AFFINITIES BETWEEN THE PAST AND THE PRESENT

OF the main objects of punishment—vengeance, deterrence, expiation, and reformation—Hindu penal law, it will be remembered, never favoured the first. For, whereas the dominant note in early Germanic law is vengeance, that in the early Hindu law is deterrence. As to the last object, reformation, it had scarcely been conceived in Hindu India in the comprehensive sense in which it is understood by the modern penologist. Nor can it be said to have made an appearance in the Western systems until near the end of the nineteenth century.

1. THE PRESENT POSITION—A COMPROMISE

Reformation has, during the last fifty years, received a wider and wider interpretation, but its fullest development may perhaps be considered the special contribution of the twentieth century. Thus reformation by measures specially adapted to the personality of the offender has now become a part of the enlightened theory of social defence and measures of protection; and it is recognized that social defence is very imperfect unless it includes those preventive and hygienic measures which are calculated to free the social atmosphere of anti-social germs. Conservative penalists, however, still retain the punitive element as a necessary factor, and, while almost accepting the view that the aim of criminal law should be social defence, insist on retaining punishment as an essential ingredient in any effective system. Thus there is, on the one hand, a lingering belief in the efficacy of intimidation by punishment and, on the other, a growing consciousness of the importance of *défense sociale* in which punishment for

its own sake has no part. A compromise between these two is sometimes proposed in the form of an experimental scheme in which, side by side with punishment, there may also be measures of safety directed against the so-called responsible as well as irresponsible criminals; and the hope is expressed that a system such as this—which is, after all, but a compromise—will lead the way to the final goal: namely, a scheme of social defence in which punishment *qua* punishment plays little or no part. Indeed this appears to be the stage at which we have arrived after long and weary struggles. It is interesting to examine Hindu penal law and to see if it reveals in any shape the germs of this modern development of penology.

2. PUNISHMENT AND SOCIAL WELFARE

Punishment, according to the Hindu lawgivers, was primarily for the good of the State. From the Vedic days the individual was subordinated to the State, which stood as a guarantee for individual self-realization. Then caste divided the different orders of life and fenced them off with impassable barriers. Buddhism, in doing away with caste, sought to establish a wonderful organization for collective service, thus again fettering the individual with the ties of social obligations. Underneath human action was seen to lie the all-pervading law of Karma, the relative freedom of the will, not, as before, the irresistible forces of heredity and environment. On this relative freedom was based individual responsibility—not absolute, but qualified—and the justification for punishment. Thus individual aberration brought on itself punishment, which the State enforced by social and religious sanctions.

The contention that the primary aim of punishment is the good of the State is often supported by the example of the punishment prescribed for killing a Brahmin. It varies in severity in different epochs according to the importance

of the Brahmin in the State. Thus in the Arthashastra of the Maurya period the punishment is not severe, while in the code of Manu it is of extreme harshness, inasmuch as the code was formulated at a time when the Brahmin had saved the country from foreign aggression, and Buddhist propaganda was threatening to undermine the Brahmin's prestige, and thus to jeopardize the safety of the State. It has again, however, lost its severity in the Mahābhārata and in Yājñavalkya, which reflect times when the danger of foreign aggression was over and the emergency prerogatives of the Brahmins were disappearing. In the Rāmāyana the well-known episode of Queen Sita's banishment and that of the capital punishment of the Sudra ascetic, Śambuka, emphasize the necessity of punishment for the welfare of society. The story of Śambuka is briefly told: When Rāma was king of Ajodhya, one day a Brahmin came to his door with his dead son in his arms and thus accused Rāma of not properly discharging his kingly duties, 'Calamities overtake subjects through the fault of the King, who does not rule according to established law. When the King takes to evil ways, people die before their time.'[1] Rāma admitted the justice of the accusation and set out to discover who had transgressed established law without his knowledge. He found Śambuka, who belonged to the Śudra order in society, practising penances in a forest, thus usurping the functions of another order, that of the Brahmin. To Śambuka's arguments concerning moral justification, Rāma's answer was his clear duty of 'upholding the existing social order'. The death penalty was meted out to Śambuka, for upsetting the social order of his day. Śambuka was the prototype of the modern

[1] Rāmasya Duṣkṛtaṃ Kiṃchinmahadasti na saṃśayaḥ |
Yathā hi viṣayasthānāṃ bālānāṃ mṛtyurāgataḥ ||
Rājadoṣairvipadyante prajā hyavidhipālitāḥ |
Asadvṛtte hi nṛpatāvakāle mṛyate janaḥ ||
Rāmāyana Uttarakanda, 73. 10, 16–7.

communist. He challenged existing values and thereby disturbed the public order of the time. Rāma's duty as a king was clear—to maintain the social standards then in force. As a man, he might like and respect Śambuka; but on the other side were the life of a Brahmin's offspring (and the Hindu social order is essentially a Brahmin creation) and the menace of a non-Brahmin social doctrine of equal rights for all. Rāma discharged his kingly duty by administering the supreme penalty of the law to Śambuka for conduct contrary to the then existing theories of social welfare.

There is a close analogy between Śunga India under Puṣyāmitra (second century B.C.) and Fascist Italy under Mussolini. Both stand for a reassertion of orthodox values: Puṣyāmitra for the time-honoured Brahmin culture, Mussolini for the glories of imperial Rome. Puṣyāmitra had to contend with invaders from outside and Buddhists at home: Mussolini faced hostility from outside Italy and communists within her borders. In each case the future of the country centred round the personality of one individual and his party. Both succeeded by strengthening the Penal Code against attacks on the ideals of the people. Manu's code and the Rocco Project achieved this object because they had behind them the public conscience.

Moreover, it is only necessary to turn to the texts of the codes themselves to find the conclusion irresistible that punishment is viewed as intimidation or deterrence, and thus as the mainstay of society. With the vivid imagination and religious instinct of the East, punishment is conceived as a person, a being, almost a deity: 'Who is Penal Providence; what sort of being is he; how does he look; how does he work? What is his essence; how did he arise; what are his manifestations; how does he control? How, again, does he keep awake, maintaining himself amongst the subjects? Who, again, remains awake, protecting this continuity

(evolution)? Who, again, is recognized as the beginning of things, who a blessing designated as penal providence? Wherein did penal providence reside; what, again, are intended to be his ways?

'Listen, Oh descendant of Kuru, what is penal sanction, which again is *Vyavahāra* (judicial proceeding)—on which indeed depends everything; it is the sole law.

'Punishment is so called in order that the righteousness of the King who is wide awake may not suffer extinction.

'Punishment is the mighty *Viṣnu*, the veritable *Yajṇa* (sacrificial rite), the Lord Nārāyana. He is called the great being, bearing an eternal mighty form.

'Thus Punishment, the daughter of the Supreme Being under diverse appellations such as *Lakshmī* (Prosperity), *Nīti* (Moral Ordinance), *Saraswatī* (Learning), *Dandanīti* (Penal Ordinance) is made manifest in diverse forms and supports the Universe.'[1]

Such personification of one of the main principles of good government is quite in keeping with oriental imagery and accords with the trend of poetic thought in India, which cannot rest content until every virtue, every force in earth and sky, and every principle in life has been personified and given an individual existence. Yet the process is so natural that it does not, in the mind of the author or the reader, obscure the practical side of punishment as an instrument of intimidation. Thus there is a practical precept for the ruler: 'Subjects can be kept on the right path only by being terrorized. Good kings never kill the wicked from motives of retribution. Good kings succeed in ruling their subjects properly with the aid of righteous acts.'[2]

Again, it is laid down that the King shall always have the rod uplifted, but seldom strike. It is only through *fear*

[1] Mahābhārata, Śāntiparva, chap. cxxi, sec. 3. Chap. i, *supra*.

[2] Mahābhārata, Śāntiparva, chap. lxvii, verse 25.

of punishment that men are kept innocuous, for harmless men are rare on this earth. It is through this fear alone that in a world both animate and inanimate each individual can live in enjoyment of his own right.[1] This aspect of the majesty of law has been significantly expressed by the Hindu lawgivers as *Mayūradharma* or the attribute of the peacock, meaning that just as the peacock extends its multi-coloured plumes to display its majesty, so the law must employ intimidation to retain its majesty in the eye of the subject.

The Śukranīti warmly commends punishment as one of the essential factors of good government. 'Through fear of punishment the subjects become virtuous, do not commit aggression and do not speak untruth.'[2] The same treatise also enumerates the different forms of punishment: 'The various forms of punishment are censure, insult, starvation, imprisonment, oppression, destruction of goods, expulsion from the city, branding the body, carrying the person on the back of ignoble animals (i.e. asses), mutilation, execution, as well as warfare.'[3] It is interesting to observe that even at that early stage imprisonment was in Hindu law a definite form of punishment, though in the penal codes of the West imprisonment began only as a method of detention before trial, and later developed into a substantive punishment. In the same chapter of Śukranīti are to be found the grades of offenders, the classes of offence, and the degrees of punishment. Dealing with the more heinous offences—those that have a tendency to cause the disruption of society[4]—Śukranīti in the next two verses prescribes the punishment: 'Knowing these persons who are wicked by nature, the King should expel them from the commonwealth. They should be bound and transported to islands or forts and employed in the work

[1] Manu, chap. vii, verse 22.
[2] Śukranīti, chap. iv, verses 92–3.
[3] Ibid., chap. iv, verses 88–91.
[4] Ibid., chap. iv, verses 192–214.

of repairing roads and made to live on insufficient and bad diet.'[1] These verses reveal two remarkable facts: that the ancient Hindus had, firstly, a system of segregation of dangerous offenders by transportation to far-off islands, and, secondly, a system of employing them on public works. Indeed *Mārgasaṃskaraṇa*, i.e. the work of repairing roads, seems to have been a common method of employing political and civil offenders, and Śukranīti makes frequent mention of it. But, whatever the form may have been, punishment seems to have held a high place in the estimation of the ancient Hindu: 'Even the cruel become mild, the wicked give up wickedness, even beasts become subdued, the thieves get frightened, the garrulous become dumb, the enemies are terrified and become allies, and others are demoralized. So the King should always administer punishment for the furtherance of morality and religion.'[2]

Instances might be multiplied, but it is sufficient to say that on analysis it becomes abundantly clear in Hindu penal law that the fundamental object of punishment was conceived to be intimidation for the purpose of deterrence. Unlike Ferri and many another criminalist of the present day, the Hindu lawgivers do not appear to have been troubled with any scepticism as to the efficacy of punishment. On the contrary, they had unbounded faith in its deterrent power. But as has been noticed before in another important particular, there is a substantial affinity between their point of view and that of the modern age; for they regarded punishment only as an instrument of social defence.[3] It is interesting to observe this doctrine of modern times in a system of law many centuries old, and,

[1] Ibid., chap. iv, verses 215–16.

[2] Ibid., chap. iv, verses 94–8.

[3] 'Social defence' as used here is in the older sense of protection of society. See sec. 5, chap. iii, *supra*.

after many vicissitudes, to find completed the development of an idea which began in the remote history of Hindustan.

3. PUNISHMENT AND PERSONALITY

But this is not all. To-day in the full-grown consciousness of the necessity for penal reform, the principal feature is the recognition that the true measure of punishment should be the offender and not the offence and that punishment should be adapted to each individual. The old classical idea that justice is no respecter of persons and that there should be the same punishment for the same offence—no matter what may be the antecedents, the heredity, the environment, in short the physio-psychical constitution of the offender—is fast becoming a heresy. Assuming that punishment itself is a *sine qua non*, the principle of individualization is now introduced to cure it of its antinomies. Turning again to Hindu penal law, there are distinct traces of a consciousness of the necessity for individualization. Says the great lawgiver Manu: 'The King shall administer punishment to the offender after fully considering the place and the time, and the capacity and education of the offender.'[1] 'If great men transgress, their punishment should be proportionate to their greatness. As regards those who offend again and again, they should not be let off without punishment, as on their first offence.'[2] Again, 'How many times the offence has been committed, the conditions (such as time and place) under which the offence is committed, the capacity or incapacity of the offender, and all other circumstances connected with the offence should be scientifically (*tattvatas*) considered before administering the punishment' (chap. viii, verse 126; see the commentary of Kulluka Bhaṭṭa, chap. i, sec. 4, *supra*).

[1] Manu, chap. vii, verse 16.

[2] Mahābhārata, Śāntiparva, chap. cclxvii, verse 16.

Does not this contain in embryo the doctrine of individualization? To consider the capacity or incapacity of the offender, his education, the circumstances surrounding and inducing his offence, and withal to consider these factors scientifically (*tattvatas*), surely is the utmost that is demanded by the modern criminalist, legist, or philanthropist. Indeed, the whole fabric of modern penal reform —the special treatment of *l'enfance coupable et délinquante*, the children's courts, the segregation of adolescents from adults, the system of probation, the rescue of waifs and strays, the detention homes and the certified schools, the special treatment of first offenders, the demand for indeterminate sentences and the condemnation of short sentences, the approval of conditional conviction or liberation, the special treatment of recidivists, the system of patronage or aid on discharge and a hundred other experiments in the West—rests on a clear grasp of this simple text written thousands of years ago.

4. DIFFERENCE BETWEEN THE OLD AND THE NEW

Here, perhaps, a word of warning is necessary. It should not be imagined that the ancient Hindu lawgivers had achieved that outlook to which the present-day criminalist has attained through the influence of the positivist school, or that they had passed along those roads of anthropological, physical, sociological, and psychological research which are associated with the great names of Lombroso, Ferri, Garofalo, and others, and which (in comparatively recent times) have revolutionized penological thought. The idea of punishment, that its object should be the offender and not the offence, has through these researches acquired a richness of meaning which was not even contemplated as late as the sixties of the last century. The full-fledged doctrine of individualization of punishment may thus be regarded as the contribution of the pre-

sent age (the last half-century), for its full significance was not realized before the beginning of the last reaction. To the Hindu lawgivers were vouchsafed the rudiments of the truth, but only by way of intuition, almost like a vision, and they could not fully analyse its implications or carry out its dictates.

Thus ancient penal law in Hindu India presents some of the main features of modern penology; for example, the realization of the necessity for punishment, or of its value in effecting the good of the State and as an instrument of social defence, rather than an instrument of retaliation; or again, the administration of punishment in a manner adapted to the individual offender.

5. CAPITAL PUNISHMENT AND EXPIATION

The theories which have been advanced in the foregoing pages receive some support from the attitude which was adopted towards capital punishment. Here again a warning is necessary. For in ancient India capital punishment with its many horrors was always prevalent. Hindu India was indeed never without it—although in the greatest days of the Buddhist kings there was heard a distinct protest against the taking of human life in any form whatever. Nor does the world know yet whether society can dispense with capital punishment, although vigorous and encouraging attempts have been made in various countries. Hindu India was apparently under the same difficulty: but it is significant that the consciousness of capital punishment being unrighteous, and, from the point of view of society, uneconomical, was very strong. The illuminating discourse in the Mahābhārata, Śāntiparva, chap. cclxvii, in which are set forth the arguments against capital punishment, and which has already been quoted in the first chapter of this treatise, reveals this consciousness: 'Sometimes virtue assumes the form of sin and sin assumes the form of

virtue. It is not possible that the destruction of individuals can ever be a virtuous act' (verse 4). 'Without destroying the body of the offender, the King should punish him as ordained in the scriptures. The King should not act otherwise, neglecting to think properly upon the character of the offence and upon the science of morality' (verse 9). 'By killing the wicked the King kills a large number of innocent men. Behold, by killing a single robber, his wife, mother, father and children are all killed. When a wicked person offends, the King should, therefore, think seriously on the question of punishment' (verse 10). 'Sometimes a wicked person is found to imbibe good conduct from a pious person. It is found that good children spring from wicked persons' (verse 11). In the above passages some of the most convincing arguments against capital punishment are formulated, namely, the inherent unrighteousness of taking life for life, the unrighteousness of punishing innocent people (children and dependants) along with the offender, which capital punishment necessarily involves, the loss to the State of possible good citizens in the prospective children of the condemned, the loss to the State of an individual who might be cured and reformed into a useful unit of society. The discourse concludes with a categorical denunciation of capital punishment: 'The wicked, therefore, should not be uprooted. The extermination of the wicked is not consonant with eternal law. By punishing them gently, by depriving them of all their riches, by chains and imprisonment, by disfiguring them, they may be made to expiate their offence. Their relatives should not be punished by the infliction of capital sentence. If in the presence of the priest and others they give themselves up to him from desire of protection and swear saying, "O Brahmana, we shall never again commit any sin", they should then be discharged without any punishment. This is the command of the Creator himself' (verses 12

and 13). The *naïveté* of the last injunction to discharge an offender without any punishment, provided he shows true contrition, may not appeal to a twentieth-century legislator. But in primitive unsophisticated society it might not have proved so unpractical as it sounds. On the contrary, it might have been the highest wisdom to put a premium on true repentance and reformation. Penance had many rules and many forms which varied according to the time, place, and circumstances of each particular case. At the least it can be said that penance was one of the accepted methods of rehabilitating the offender.

In dealing with the history of penal conceptions one cannot but feel impressed with the truth of the Spencerian maxim: 'Evolution is a continuous change from indefinite incoherent homogeneity to definite coherent heterogeneity through successive differentiations and integrations.' If truth is universal, may we not say that the truth that was vouchsafed to earlier civilizations has now, through successive differentiations and integrations in diverse countries and under diverse conditions, been consummated in modern penology?

V

MEASURES OF SAFETY *VERSUS* PUNISHMENT

1. SOCIAL REPARATION—UNIVERSALIZING OF RESENTMENT

IN the foregoing chapters an endeavour has been made to trace the gradually developing purpose of law until *défense sociale* in modern times becomes its primary object. This newly-developed idea of *défense sociale* is different from the loose expression 'social defence' which is often found in the literature of criminology. For instance, criminal law is at one period defined as 'a formulated system of self-protection' or, at another, as 'an instrument of social defence adapted to the requirements of the sense of justice'.[1] These definitions are clearly not free from a punitive element and are based on punishment viewed as a means to some kind of retribution. They, no doubt, represent an advance on the crude, primitive view of retribution, where retribution inflicted on the wrongdoer was regarded as the normal mode of reparation to the person injured. There the retribution, as well as the reparation, was estimated in relation to the individual wronged. The advance consists in a transformation which universalizes the resentment[2] and assesses both retribution and reparation from a universal or social point of view. But the advance leaves the punitive idea still markedly present in the so-called 'self-protection' of society, or 'social defence'. The objective is no longer individual reparation but social

[1] *The Individualisation of Punishment*, by Prof. Raymond Saleilles (Modern Criminal Science Series), chap. i, sec. 1. Another definition of criminal law there given is 'the sociology of crime adapted to the sense of justice'.

[2] See Sidgwick, *Methods of Ethics*, 5th edition, book iii, chap. v, p. 281. See also Prof. Courtney S. Kenny, *Outlines of Criminal Law* (Cambridge University Press, 1902), pp. 33–4.

reparation, demanded by the sense of justice, dictated by the recognition of individual responsibility, and accomplished by punitive measures. The articles of this creed therefore take this form: An offence involves an injury to the social framework which consequently requires an adequate reparation. Such reparation is effected by punishment. Without punishment the steel frame of society, namely justice, suffers gradual deterioration. The exact form which this reparation must take in each particular case is a matter of detail rather than of principle. But each offence must have its own punishment prescribed, because otherwise, it is believed, there is bound to be chaos. The main principle, however, underlying the administration of punishment is that it should be quick and certain, and not left to the whims and caprices of individual judges so as to admit of either excess or laxity.

This, therefore, is the modern addition to the classical theory of punishment—that it universalizes resentment. But it inexorably demands, as before, that every objective act of crime must be met by an objective act of reparation, so that wherever there is an offence there is a remedy. For every specific injury done to the body social there is to be a specific mode of reparation calculated to counterbalance the evil suffered. Punishments are these specific modes of reparation; each punishment is adjusted to each violation of social obligation. The criticisms of this objective view of criminality are well known: it is too abstract, too mathematical and mechanical; and finally, it is too formal to compete with the concrete realities of life that must be taken into consideration if true justice is to be done to the lawbreaker, who is no mere abstract figure, but a living, striving, though stumbling, human being. The history of penal law and legislation provides many instances of attempts to depart from this rigid doctrine.

But the objectivity, or materiality, of crime, and the conception of self-protection, or social reparation, remain essential elements in our criminal system, based as they are on the conception of justice already described. In earlier systems these elements were the dominant factors with this distinction, that in some systems, such as the Hindu system, the dominating *motif* was intimidation rather than vengeance, and in others, such as the Anglo-Saxon system, vengeance rather than intimidation. Later there is a gradual metamorphosis, and with the growth of social conscience the object sought is social reparation by punishment.

2. OBJECTIVE AND SUBJECTIVE REPARATION

The inadequacy of the classical conception of the objectivity of crime and punishment is very well brought out by the use of the words *Vergeltungstrafe* and *Zweckstrafe*. Whereas the former stops short at objective reparation, the latter contemplates the future and arrives at the final purpose of punishment—reparation in an ampler and deeper sense to include the rehabilitation of the individual offender. Thus, from the crime regarded in objectivity, the mind turns to the personality of the criminal. The individual is regarded not as a mere unit, not as a mere number in a ward, but as a human being. It is no longer the crime that fixes the punishment, but the criminal himself becomes the primary factor in determining his own punishment.

Historically, this principle had its origin in the earlier researches of the much misunderstood Cesare Lombroso. For now it is scarcely questioned that it was Lombroso's influence which caused the criminal to take the place of the crime as the starting-point of criminology. 'Lombroso's greatest merit', says Ferri, 'was to draw the attention of the world to the personality of the

criminal; before, men knew penal justice, but penal justice did not know men, as has been stated by Van Hamel who, together with Liszt and Prins, founded the new school of penal law. From its beginning, the school of Lombroso has made a distinction between different classes of criminals and has always recognized the influence of the social environment on the genesis of criminality. Also, the Italian school does not consider merely the physical qualities of the offender, but his psychological, intellectual, sentimental, and moral personality too.'[1] Thus, as in medicine, so in penology, the system of cataloguing diseases and assigning a specific for each in a hard and fast fashion falls into disrepute, and the criminal like the patient occupies the foremost place for study. In other words, penology for the first time becomes a method of treatment! As Van Hamel observes: 'When our prisons are full of human beings, when we have daily before our eyes men who have been criminals in the past but are to be citizens in the future, when, firstly, by the force of humanitarian ideas and then by the pressure of scientific conceptions as to the etiology of crime, public opinion becomes interested in these men, their present and their future, in what they have to expect from society and in what society has to expect from them; it is not to be expected that an *a priori* determination as to the exact punishment in each case will in all cases be acquiesced in; and so it is that under the double influence of humanity and of science, the principle of 'indeterminate sentence' has sprung into existence under its two forms (*a*) as a measure of reform, (*b*) as a measure of social defence.'[2]

[1] *Proceedings of the Ninth International Penitentiary Congress, London*, p. 236 (Staempfli & Co., Bern, 1927).

[2] Paper contributed by Van Hamel and read at the International Prison Congress at Brussels, 1900. These observations were made by Van Hamel specially with reference to the principle of indeterminate sentence, but they have a bearing on the general scheme of subjective reparation.

3. PARALLELISM BETWEEN PUNISHMENT AND MEASURES OF SAFETY

Indeed the characteristic of this new school[1] represented by Liszt, Prins, and Van Hamel consists in the introduction of the subjective point of view into penology and in their advocating repression for some offenders, and preventive measures or measures of safety for others—the difference of treatment turning on the personality of the offender. The later history of the controversy reveals the fact that it is hard to extinguish the faith in vindictive punishment as a means for obtaining individual or social reparation. Although punishment has now ceased to be regarded, as formerly by the classical school, as the only efficient remedy, the belief that its presence side by side with measures of safety is essential in every scheme of criminal law recurs again and again in different forms and with varying intensity. Thus a kind of parallelism is established between punishment and measures of safety, though this is not found in the theories of the radically positivist school, from whom the inspiration as to this

[1] De Quiros calls this school the 'Reformers'. He collects into one class a large number of thinkers of various countries who are allied in thought in so far as they view the retention of punishment and measures of safety as two parallel and equally indispensable factors in penology: 'The reformers are in the majority everywhere. Among the most noted, we may mention the late Tarde and La Grasserie in France; Prins in Belgium; Stoos in Switzerland; Van Hamel in Holland; Liszt in Germany; Zucker in Austria; Fayer in Hungary; Drill in Russia; Typaldo Basia in Greece; Mendes Martins in Portugal; Alcantra Machado in Portuguese America, &c. In some countries special reviews have been founded, like Liszt's *Zeitschrift für die gesammte Strafrechtwissenschaft;* Stoos' *Schweizerische Zeitschrift für Strafrecht,* or *Revue pénale suisse*; and the *Revue de Droit pénal et de Criminologie* in Belgium. In Italy, from Lucchini to Ferri, from the *Rivista Penale* to the *Scuola Positiva,* the various shades of reforms succeeded in giving birth to a group called the Third School under the leadership of Alimena and Carnevale.' See *Modern Theories of Criminality* (Little, Brown & Co., Boston, 1912), p. 131.

See also the observations of M. Saleilles on the same subject in chap. iv of *The Individualisation of Punishment,* pp. 87 and 98; also sec. 43 on 'La Terza Scuola', p. 125.

parallelism is indirectly derived by Liszt and others, and who themselves hold that the ideal State is one in which punishment as a measure of repression is non-existent.

According to the more radical doctrine the reformation of the individual is but a step in the progress of the purpose of criminology. From the reformation of the individual offender there is a further step to the larger theories of the modern positivist school, who hold the purpose of law (and not merely of punishment) to be the protection and preservation of the body social in a healthy state by means of adequate measures of safety (*mesures de sûreté*), and who regard the reformation or rehabilitation of the individual as only a part of that grand scheme of *l'hygiène préventive*. The pivot on which such an essentially utilitarian law must turn is not the offence committed, nor only the future well-being of the offender himself, but the health and wholesomeness of the society in which he moves. The vital problem is how to shape and mould the law in accordance with this purpose.

Underlying all the modern movements for social reform and all the activities of social philanthropy there is this conception of *l'hygiène préventive*. At any rate, at the present day for either the classical school or the positivist school an adherence to the general proposition that the State should adopt certain measures for ensuring social hygiene does not appear to be inconsistent with the fundamental position of either. The criminalist of the positivist school, however, gives the first place in his theories to *défense sociale* and *l'hygiène préventive* and lays the foundation for them in a scientific study of anthropology or sociology. Indeed, the leaven of positivist thought has penetrated farther than its opponents admit. As was observed by Coll at the First International Congress of Penal Law at Brussels: 'Nous croyons que le triomphe complet de la pensée de l'école positiviste est indiscutable

dans le droit en formation; et il est déjà en partie dans les législations de tous les pays qui adoptent la liberté conditionnelle; la condamnation conditionnelle, les mesures de sûreté pour les récidivistes habituels ou les mineurs responsables, s'il y en a, et l'arbitraire judiciaire ont blessé à mort le fondement classique de la répression.'[1]

4. THE DIFFERENCE IN ACTUAL WORKING BETWEEN THE CLASSICAL AND THE POSITIVIST SCHOOL

The difference between the classical and the positivist school is not so much in the details of their respective programmes—for in them there is considerable similarity—as in their fundamental outlook. To test this, consider a concrete case: An individual, having committed an offence, is brought before the tribunal. As soon as the fact of the offence has been determined, the question arises as to how it shall be dealt with, and it is at this point that the real difference first emerges. Assuming an offence, is there to be punishment for the offender, or are measures of safety to be adopted in relation to the offender and to society? Punishment answers to the desire for moral responsibility, and the classical criminalist, taking his stand on responsibility, would advocate punishment. On the other hand, measures of safety fulfil the requirements of *défense sociale* and therefore the positivist criminalist, essentially a determinist, would recommend measures of safety and not punishment. In his eyes moral responsibility is not within the competence of the State, and thus punishment clearly falls outside its purview: 'Mais je pense que la mesure de la faute morale n'est pas de la compétence de l'État qui n'a que le droit et le devoir de défendre la société contre les criminels par la menace d'une sanction contre l'action délictueuse. La foi religieuse,

[1] Premier Congrès International de Droit Pénal: *Actes du Congrès*, Paris (Librairie des Jurisclasseurs—Éditions Godde, 1927), p. 537.

la philosophie morale, le sentiment public peuvent juger la faute morale; mais l'État ne sait qu'exercer la défense sociale, tout en donnant avec ses lois la réprobation morale des délits. Telle est aussi la pensée de la Bible et de Jésus, lorsqu'ils disent: Non pas juger.'[1]

5. MORAL RESPONSIBILITY AND PSYCHIC RESPONSIBILITY

In the above passage Enrico Ferri raises directly the old objection to a system of punishment based on moral responsibility, namely, that it rests on ethical considerations which have no place in law. But at the Brussels Congress this objection was met by Givanovitch, who complained that Ferri was confounding moral with psychic responsibility. Law, he said, could be separated from morality, but it was impossible to separate them from psychic phenomena.[2] In other words, an appeal is made to the consciousness of the criminal himself requiring him to admit that he has done something to incur the censure and disapprobation of society, which has manifested its displeasure in a recognized form. Looked at in this light of a willing expiation, punishment is justified. If the term is preferred, it may be called a measure of safety, but viewed from a psychic standpoint the so-called measure of safety is punishment and nothing else. This point was very clearly brought out during a discussion of the question by Paul Matter, who observed: 'The maxim "To pay one's debt to society" proves that in the mind of the masses there exists the sense of responsibility'.[3]

Here another interesting avenue of thought begins: if

[1] *Actes du Congrès*, p. 538.

[2] 'On peut séparer le droit de la morale, mais il est impossible de les séparer des phénomènes psychiques.'—Premier Congrès International de Droit Pénal, *Actes du Congrès*, p. 542.

[3] 'Payer sa dette à la société prouve que dans l'idée de la masse existe le sens de la responsabilité.' Paul Matter, Advocate-General of the Court of Cassation and Chief of the French Delegation, *Actes du Congrès*, p. 545.

it be the appeal to the inner consciousness of the offender which makes punishment appropriate or justifiable, then it ceases to be punishment and becomes, and is accepted by the offender as, treatment suited to his particular case. Under such circumstances it may be contended that punishment is a species of the genus 'measures of safety' (*mesures de sûreté*), inasmuch as the latter includes treatment and reformation of the offender, and embraces all the other measures which are part of the grand scheme of *l'hygiène préventive*. This view of punishment justified by 'psychic responsibility' appears again and again, though presented in different forms and contexts. Lord Haldane, speaking at the Ninth International Penitentiary Congress held in London in 1925, thus gives expression to it: 'Punishment", he says, "may have a significance that is retributory and it may also have a significance that is reformatory. The two need not always conflict and it may be right to take both aspects into account: . . . punishment may become for the criminal his own act of expiation. In this aspect it gets a wholly new quality, a quality which seems to have been too little considered. In accepting his suffering, in the form of restriction of his liberty or even the loss of his life, the prisoner is accepting the principle which society has laid down, and, if he does accept the result of the law, he is identifying his will with the will of his fellowmen. More than this, he is submitting to his punishment as a reparation made to the fellowman against whom he has sinned in the crime he has committed. This aspect of his punishment is real for the culprit only if he has adopted it, and it can profit his mind only if he has adopted it *ex animo*.'[1] Again, speaking of the educative effect of punishment, Lord Haldane observes: 'No doubt punish-

[1] *Proceedings of the Ninth International Penitentiary Congress*, held in London in August 1925, published at Bern under the auspices of the Bureau of the International Prison Commission, by Staempfli & Co., 1927, p. 278.

ment conveys a lesson to the public. But that lesson is more than one of intimidation only. It should inculcate, for the criminal and the outsider alike, a recognition of the true nature and moral quality of the deed. The criminal must be led to say, if it be possible, not only that he has been a fool, but that he has been a sinner and has been rightly served in the eyes of decent people. The educative effect of punishment thus depends on the recognition of its justice, and its justice does not depend merely on its educative effect. The "serve him right" sense has to be awakened.' The 'serve him right' sense spoken of here is no other than the 'payer sa dette à la société' sense of Paul Matter[1] and the psychic responsibility of Givanovitch.[2]

6. IS THERE NO REAL DIFFERENCE BETWEEN PUNISHMENT AND MEASURES OF SAFETY?

Considered in this light, punishment may be regarded as merged or incorporated in the scheme of social defence. In other words, whether there be a punishment or so-called measure of safety, it may be looked upon as the appropriate measure of social defence suited to the requirements of the case. Indeed, Ferri may have had this in mind when he introduced the anecdote concerning Marcus Aurelius and a Roman Praetor to illustrate his point: 'Le Préteur demandait un jour à Marc-Aurèle ce que l'on devait faire d'un homme qui, en état de démence, avait tué sa mère: S'il résulte, dit l'empereur, que cet homme a tué sa mère dans un état de fureur et qu'il n'y a pas de simulation, tu peux être large dans la condamnation; car il est déjà puni par son état de fureur. Cependant il est à garder diligemment et même il doit être mis en état d'arrestation, puisque cette arrestation servira et

[1] See p. 53 *supra*.
[2] See p. 53 *supra*.

de peine pour l'aliéné, et de protection pour lui et de sécurité pour ses voisins.

'Il résulte de cet exemple, qui est dans les Pandectes, (liv. i, titre 18, frag. 14) que la mesure de sûreté qu'envisageait l'empereur romain comme restriction afflictive de la liberté personnelle du criminel aliéné a le triple caractère de peine pour le délit commis, de tutelle pour le criminel fou, de sécurité pour les voisins.

'Au fond, la peine et la mesure de sûreté n'ont qu'une différence; et c'est celle d'un principe qui les justifie.'[1]

With great respect to Ferri, it may, however, be observed that the illustration is hardly apposite because Marcus Aurelius is there considering the case of a demented person for whom moral responsibility is out of the question in the view of either the positivist or the classical school. In his case clearly the only course is to adopt some 'measure of safety'.[2] In any case, it is clear that Ferri would prefer to see punishment take its place amongst measures of safety without retaining any of its classical associations. In other words, punishment *qua* punishment has no place in Ferri's ideal system. But apparently, as a compromise, Ferri, in spite of his open aversion to punishment, subscribed to the resolution passed at the First International Congress of Penal Law at Brussels, which

[1] *Actes du Congrès*, p. 538.

[2] See also the observations of Silvercruys on the application of the illustration: 'Je demande très cordialement à M. Ferri la permission de revenir un instant sur le texte du Digeste dont il nous a aussi parlé et dont il s'est autorisé pour nous dire que déjà Marc Aurèle aurait appuyé son ordre du jour. Le préteur a donc signalé à Marc Aurèle qu'un individu avait tué sa mère mais qu'il fallait en faire. Ce à quoi Marc Aurèle aurait répondu: S'il est dément, il n'est pas coupable; mais s'il a tué sa mère, il est dangereux; et il faut le mettre dans l'impossibilité de nuire.

'Permettez-moi de le faire remarquer: cette réponse, loin de fortifier la thèse qui nous est proposée et qui tend à généraliser la substitution des mesures de sûreté aux peines en vigueur, est au contraire tout à fait susceptible de justifier la prétention contraire; car la question reste de savoir ce qu'aurait dit Marc Aurèle si l'assassin n'avait pas été un insensé.' *Actes du Congrès*, pp. 548–9.

took the following threefold form: (1) Punishment is not sufficient for social defence; (2) Punishment *in the classical sense* should be conserved; and (3) Punishment should be completed and rendered more efficacious by measures of safety. In thus identifying himself with a view of punishment which is at variance with his own estimate of the value of punishment[1] he undoubtedly acted in the best interests of future progress. For the secret of success in practical endeavours lies not in standing aloof in defence of an abstract theory, but in converting the dissenters to the true doctrine by constant association and influence. It would hardly have been expected of Ferri, that, failing to obtain the whole loaf, he should reject even the half-loaf of reform which the terms of the resolution promised.[2]

7. IS PUNISHMENT AS AN INSTRUMENT OF INTIMIDATION BOUND TO SURVIVE?

But the challenge thrown out by the classical school remains, and punishment as an instrument of intimidation, as distinguished from Ferri's punishment as a measure of safety, is still, in the estimation of many, an essential factor. The old school of thought, far from being neglected, has redoubtable champions, who reiterate their conviction of the supreme efficacy of punishment. A frank acknowledgement of this was made by no less a personage than Lord Cave, Lord Chancellor of England, in his memorable address on Indeterminate Sentence before the Ninth

[1] 'A panacea whose potency is far beneath its reputation'. See *Criminal Sociology*, p. 93.

[2] 'I have been watching for forty years the continued progress of Positivist ideas and, since the law of gradual progress is a law of nature, I am not an opponent of penal legislation which, while it abandons the pure doctrine of classic principles, remains still, owing to its obedience to tradition and to community of sentiment, at the intermediate state—punishments and measures of protection—which represents in a general sense the spirit of the Brussels Congress.' See article by Enrico Ferri on 'The Principle of Responsibility at Law' in *Revue internationale de Droit pénal*, vol. v, part i.

International Penitentiary Congress held in London in August 1925. 'Our people', observed the Lord Chancellor, 'still regard the criminal, not as an unfortunate invalid who should be subjected to curative methods, but as an offender against the public good; and the idea of punishment as an element of the penal law is not obsolete in this country.'[1] This attitude on the part of Great Britain is intelligible because, while accepting and adopting such curative, or other, 'measures' as were found to be practicable, and incorporating them in the classical framework, Great Britain has so far shown no enthusiasm for the progressive theories of the Continent, nor taken any part in the battle of the positivist against the classical school. Indeed the genius of Great Britain has revealed itself rather in practical endeavours than in theory.

But the same view is far from being obsolete on the Continent itself. During the deliberations of the First Congress of the International Association of Penal Law the resolution on the question of 'Measures of Safety *versus* Punishment' was framed as cautiously and in as conciliatory a spirit as it could be. 'Le Congrès, en laissant aux discussions théoriques la question sur la différence substantielle ou formelle entre peines et mesures de sûreté;

Constate que la peine comme sanction unique du délit ne suffit pas aux exigences pratiques de la défense sociale, soit contre les criminels plus dangereux par leur anomalie mentale ou par leurs tendances et habitudes au délit, soit vis à vis des mineurs plus ou moins rééducables.

'Il faut donc que le Code pénal règle aussi des mesures de sûreté en rapport avec la personnalité du criminel plus ou moins réadaptable à la vie sociale.

'La peine et la mesure de sûreté doivent être des actes

[1] *Proceedings of the Ninth International Penitentiary Congress*, held in London in August 1925, p. 265.

de jurisdiction avec faculté laissée au juge d'appliquer l'une ou l'autre suivant les circonstances du fait et la personnalité du prévenu.'[1]

The proposition that punishment and measures of safety should be acts of jurisdiction to be applied according to the circumstances—the facts relating to, and the personality of the offender—had already been adopted by the German, Swiss, and Austrian projects which allowed the judge the discretion to substitute measures of safety for punishment, and vice versa. Yet the opposition to it was led at the Congress by men of eminence and experience whose voice must carry weight. One of them,[2] for instance, staunchly upheld the proposition that retribution and intimidation should be the immediate object of criminal sanction, and measures of safety should only be resorted to in the case of occasional and 'passional' offenders. Another[3] formulated his proposition from the typically classical point of view, and though subscribing to the epigram of Van Hamel which was cited by Ferri, 'L'homme a connu la justice. Il est temps que la justice connaisse l'homme', expressed the opinion that measures of safety were necessarily restricted in their operation—a view obviously resting on a misapprehension of the scope and purpose of measures of safety—and that punishments had a wider sweep altogether. Fairly analysed, his argument amounts to this: A measure of safety applied to an offender has for its object the well-being of the offender only.[4] All that it

[1] *Actes du Congrès*, p. 540.

[2] Thomas Givanovitch, Professor of the University of Belgrade. See *Actes du Congrès*, p. 541.

[3] Megalos Caloyanni, formerly Counsel of the High Court of Cairo and President of the Hellenic Group of Delegates to the Congress. *Actes du Congrès*, p. 543; cf. *infra*.

[4] 'A la mesure de l'élimination doit s'ajouter en second lieu celle de l'intimidation, surtout destinée à impressionner les futurs criminels. L'opinion publique a aussi exigé dans son intérêt que l'individu qui a troublé l'ordre public soit placé dans un endroit où il lui soit impossible de nuire.' *Actes du Congrès*, p. 543.

directly takes into account is his rehabilitation. For instance, in conditional discharge with or without probation there is nothing contemplated but the gradual reform and rehabilitation of the individual offender. But if it be said that, since society is composed of individuals, the good of the individual involves the ultimate good of the society, and that, therefore, a measure of safety must carry with it its own extended operation in the future, the answer is perhaps that it is at best a far-off future. It may even be called a Utopian future, as it contemplates a state when, by means of measures of safety and 'penal substitutes',[1] the hygienic condition of society will be so improved as successfully to repel and retard the operation of crime-factors. That is too much to expect within a measurable distance of time. Indeed, even Ferri himself at times did not cherish the hope that punishments could wholly be dispensed with.[2] On the other hand, it is claimed that the virtue of punishment is that it contemplates not only its effect on the offender's mind but also on those of his neighbours. It is from this aspect that punishment is said to have a wider sweep. Again, it is contended that the effect of punishment is immediate, as it instantly prevents the contamination of the next-door man, whereas a measure of safety is slow in its operation, and in its effect is primarily

[1] See Ferri's *Criminal Sociology* (D. Appleton & Co., 1915), p. 112: 'These penal substitutes, when they have once been established in the conscience and methods of legislators, through the teaching of criminal sociology, will be the recognised form of treatment for the social factors of crime.'

[2] 'Penal substitutes should become the main instruments of the function of social defence, for which punishments will come to be secondary means, albeit permanent. For in this connection we must not forget the law of criminal saturation, which in every social environment makes a minimum of crime inevitable, on account of the natural factors inseparable from individual and social imperfection. Punishments in one form or another will always be, for this minimum, the ultimate though not very profitable remedy against outbreaks of criminal activity.' *Criminal Sociology*, p. 112. He appears, however, in some of his later writings, to have outgrown this view and taken his stand on measures of safety as sufficient by themselves.

restricted to the offender alone, so that only by some remote process may it affect the well-being of society.

Moreover at the Congress there was another point raised: that in the present state of public opinion, punishment *qua* punishment is essential and must be retained on grounds of public policy. If by discarding punishment altogether the law runs counter to public opinion, it may lose its power over the people and be replaced by the horrors of lynch law. For there must be gradual organic evolution and no catastrophic change. It may even be hoped that if, and when, the public mind is convinced that social problems should be regulated by social necessities, measures of safety will take a larger place in the statute-books without any danger of the people taking the law into their own hands.[1]

7. PUNISHMENT AND MEASURES OF SAFETY ARE BY NATURE DISTINCT AND MUST BE KEPT DISTINCT

The most conspicuous feature of the debate was, however, the practical spirit of compromise and conciliation manifested by the leading thinkers who, while agreeing to differ in theory, resolved for the sake of reform to co-operate and make room for both punishment and measures of safety in future schemes. Here is striking testimony: 'Je suis convaincu que la répression pénale doit garder le principe de la peine rétributoire, mais il importe de la réformer dans un double sens. Tout d'abord, la loi devrait éxiger du juge une plus grande attention à la personne du criminel. Ensuite, si la peine ainsi appliquée ne suffisait pas à protéger la société, les mesures de sûreté devraient venir s'y adjoindre. La preuve qu'un

[1] See the observations of M. Milota, Professor of the University of Bratislova, and of M. Mercier, Professor of the University of Lausanne in *Actes du Congrès*, pp. 546–8; pp. 551–3.

tel compromis salutaire est possible nous est déjà fournie par les avant-projets polonais, roumain, tchécoslovaque, &c. . . . J'ai moi-même eu l'avantage de collaborer à ce dernier et j'ai pu en préparant la partie de notre Code pénal, mûrement peser les qualités pratiques d'une pareille solution.

'Le remplacement absolu de la peine par la mesure de sûreté ne pourrait être envisagé que dans les seuls cas où le peuple ne sent pas avec force le besoin moral de la juste sanction. Je veux dire: dans le cas des mineurs où l'effort en vue de leur amendement ne doit être affaibli par aucune autre considération; puis, dans celui des *récidivistes* à l'égard desquels la sévérité des mesures de sûreté est en harmonie avec l'aversion populaire.'[1]

The parallelism between punishments and measures of safety, indicated in the earlier sections of this chapter discussing their theory and history, now manifests itself in the form of a happy co-operation between the two opposing schools, who conjointly foreshadow an analogous parallelism in future projects of criminal law. The projects already in existence and those that may be expected will be considered later. But what is noteworthy is that the projects foreshadowed will only be the external counterpart, or embodiment, of the parallelism of ideas of which we have already spoken.

There is, however, one consideration which cannot be disregarded, namely, that as two parallel lines can never meet, so punishment and measures of safety can never really meet and merge into each other. Punishment in the last analysis turns on the 'serve him right' principle, to use Lord Haldane's expression. Measures of safety, on the other hand, turn on the principle of social defence, protection, or assurance. The latter idea is distinct in its conception and execution, though there is much loose thinking

[1] *Actes du Congrès*, pp. 547–8.

in this matter. For it is often said that if an individual is interned as a measure of safety, he may legitimately be said to be subjected to punishment. Again, it is said that, the right aim of punishments as well as of measures of safety being the reform of the delinquent, the distinction is no more than a quibble.[1] The answer to this is to be found in the words of Ferri: 'There is no difference between punishment and measure of safety—it is the principle underlying either that justifies the difference.'[2] And the more the principle is analysed, the more the difference is accentuated.

Consider for a moment the principle of punishment: the 'serve him right' principle dictates that the punishment should have the quality of dreadfulness, that lessons of fear should be drilled into the mind of the offender, that kindness and consideration should have no part in the picture, that the greater the despair of the offender the more efficacious the punishment. On the other hand, in the measures of safety, the end or purpose is not fear but hope of redeeming the offender and thus securing the safety of society. To effect the cure of a patient and the safety of the household all things are subordinated to the supreme question of recovery. Even falsehood is allowed, according to medical ethics, in encouraging the patient to gather up his battered health and to make him feel confident. Thus physiology and psychology are both brought into requisition. Why should it not be so for the cure of crime, and for the safety of the social household? With the unfortunate criminal why should everything be done to

[1] 'En somme punition et mesure de sûreté se confondent dans l'opinion. Car si l'individu qui a troublé l'ordre public est interné par mesure de sûreté, l'opinion pourra se dire qu'il subit sa peine.

'Il n'y a donc de distinction ici que dans les mots.

'Le but, en somme, doit être de redresser les délinquants.' *Actes du Congrès*, p. 543.

[2] *Actes du Congrès*, p. 538. See *supra*, sec. 5.

prevent recovery? Why should not fear give way to hope, ruthlessness to kindness, so-called plain-spokenness to words of cheer, in short, the punitive to the scientific attitude? These are the pressing questions which the positivist school asks and answers in accordance with its own progressive doctrines.

VI

MEASURES OF SAFETY AS THE GOAL OF PENOLOGY

1. NO MEASURES OF SAFETY WITHOUT A COMMITTED ACT

IN the foregoing chapter has been discussed the distinction between moral and psychic responsibility, which leads inevitably to abstruse problems of the psychic state of the individual delinquent—questions that are of little practical value in law or legislation. The positivist school take their stand neither on moral nor psychic responsibility, but on 'legal responsibility', which is based on the dangerousness or formidability of the particular criminal (*la temibilità*, to use the Italian expression). Such dangerousness either may exist without manifesting itself in a committed act, or may find vent in such an objective act. It is only in the latter case that it comes within the cognizance of law. Should there be a latent dangerousness not yet manifested by an objective act, it might properly come within the domain of those social and philanthropic activities which combat, or neutralize, the formidability of the potential criminal. But in the eye of law the formidability comes into existence at the moment the delictual act is committed and not before. Otherwise there would be a risk of the law becoming too oppressive. Society would indeed be in a parlous state if the law admitted repressive or defensive reaction against what is only latent formidability and potential crime. Therefore even with the positivist school it is the criminal act which remains the pivot on which legislation or defensive reaction must turn. On this fundamental point there is affinity between the classical and the positivist schools. 'No penalty without a crime', says the classical as also the neo-classical school.

Indeed, as von Liszt has observed, the penal code is the true *magna charta libertatum* of the citizen, inasmuch as the criminal is apprised by it of the particular punishment prescribed by the law as the fixed price to be paid for the crime committed, and is thus put on his guard as to the extent of the risk incurred by infringing the law. Similarly in the scheme of the positivist school, if legislation is to have the same concreteness and precision, the committed (or repeated) act must form the starting point and must furnish the occasion for defensive reaction. Hence, substituting measure of safety for punishment, the corresponding maxim to which the positivist school is driven is 'No measure of safety without a committed (or repeated) act'.[1] There is ample support for this view from Ferri and from other exponents of positivist doctrines.

[1] See an article headed 'Judicial Guarantees of Measures of Security' by Prof. Emil Stanislaw Rappaport (President of the Warsaw Conference, Rapporteur at the Rome Conference, and First Delegate of the Polish Government to the aforesaid Conferences) in the July number of *Revue Pénitentiaire de Pologne* of 1928, from which the following passage is extracted: 'All the new projects of penal codes have definitely accepted this dualism of reaction against crime; they have all introduced "measures of security" side by side with "penalties", but practically all have clearly failed to connect the theory and the practice of legislation, to introduce into the code the definition of the state of danger, i.e., of the dangerous character, &c., of the agent, beyond the direct responsibility for the act committed.

'The Italian project is a remarkable exception in this matter (art. 203 and 204). In the first place it tries to find for this new reaction a legislative expression which would really place it (i.e., the measures of security) on the same level as penalties in modern judicial guarantees.

'This attitude, which is entirely justified, leads the Italian legislator to a general definition of the dangerous state of the delinquent, but this definition has nothing in common with an abstract definition or with philosophical or social considerations; it merely establishes a clear and absolute criterion for the *legislative conception* of the dangerous state, based on the fact of either the committed act (art. 203) or the relapse (art. 204). This new idea of degrees in dangerousness of individuals to the social order is indispensable in positivist law for the prevention of possible abuses in the shape of social aggression "against the freedom and rights of the citizen."

'Consider for a moment with what this new conception is associated. Indirectly, it is connected with the acts committed by irresponsible agents (art. 203)

This point is questioned, however, by Professor Saldana of Madrid, Vice-President of the Association internationale de Droit pénal, and member of the Codification Commission in Spain, who observes: 'It is recently and through the new theories of crime that the "struggle against crime" was started. This struggle has taken into account the dangerous state not only of the criminal but of the man as well. This sociological idea of personal or subjective danger, which comes perhaps from the juridical theory of the objective peril (*pericolo*) of the Italian criminalists of the last century, expresses only the quantity of a possible or probable offence, that is to say of probable criminality that broods in each man; and it is in virtue of this humanistic conception that we have formulated since 1913 the phrase "there are no criminals, but only men". Thus the subject of the measure is man.'[1] But the learned author ignores the distinction between measures which the law can enforce only on the commission of a crime, and preventive or defensive measures which can be enforced, independently of any committed act, through either the police, or social and philanthropic bodies. The distinction, however, is important, and disregard of it may lead to confusion, as may be seen from another passage in the same thesis: 'If punishment is the counterpart of the execution of the crime, which is itself the necessary condition of punishment (*nulla*

and with the repetition of offences by responsible agents (art. 204), i.e., *the criminal act remains all through both the starting-point and the necessary condition of any repressive and defensive reaction in modern penal legislation.*

'After committed acts there remains the further question of social assistance for abnormal individuals, but such assistance is not within the domain of the penal code; it has nothing to do with the dangerous state of an irresponsible agent or of a hardened delinquent, and has, therefore, nothing to do with the idea of measures of security in modern criminal policy.

'To the old formula of "no penalty without a crime" there should be added to-day a new one of "no measures of security without a committed or repeated act",' pp. 220–1.

[1] See article headed 'Punishment and Measures of Security' in the *Revue Internationale de Droit pénal* 1927, part 1, p. 38.

poena sine crimine) the measure of security is related first *to the full crime*, real and possible, anterior, actual and subsequent to the execution, then beyond the crime to every personal danger.'[1] And he gives his reason for applying measures to the ante-delictual, as well as to the post-delictual, stage of the criminal thus: 'If punishments are material or physical weapons in the struggle against crime, measures of safety are the chemical weapons; for they attack crime in its sociological and physical elements. It is in their aetiological, anti-criminal efficacy and not by reference to the moment of their application—before or after the crime—that they should draw their character of being essentially preventive. . . . When there is a question of measures of safety the test of execution must, therefore, be rejected.'[2] He then proceeds to criticize Ferri, in whose view police measures are far from being true 'measures of security' within the domain of penal justice, for, says Ferri, 'measures of security are applied only after the offence has been committed or owing to it, whilst police measures may be applied even before an offence is committed'.

The criticism is based on a misapprehension and a confusion between the use of the term 'measure of safety' to denote the juridical counterpart of a delict, which is the defensive reaction by the legislature or judiciary, and the use of 'measure' in the general sense of means of prevention. In every penal code are found provisions that confer power on the magistracy and the executive to secure or assist the prevention of crime. These are called 'preventive measures'. Police measures are comprehended within this class. But they are not 'measures' in the strict juridical sense. What Ferri calls 'penal substitutes' may very well be regarded as an extension of such extra-juridical preventive measures, inasmuch as they do not

[1] Ibid., pp. 35–6. [2] Ibid., p. 35.

impinge on an act of crime, but are directed towards removing the conditions that make crime possible.

2. THE SYSTEM OF MEASURES OF SAFETY AS THE POSITIVIST IDEAL

Although the substitution of measures of safety for punishment is avowedly the ultimate object of the positivist school, it can scarcely be said to have consistently maintained that object in its orthodox and uncompromising form. Even Professor Ferri, the most redoubtable champion of this doctrine, has changed from time to time[1], and relaxed the stringency of the view that punishment must give place entirely to measures of safety. In 1926, in the report presented by him on behalf of the Italian group to the First International Congress of Penal Law at Brussels, he thus delivers himself: 'The positivists, on the contrary, say that the repressive sanction, established by penal law, comes always under the shape of punishment or of measures of safety, a forced diminution of legal benefits enjoyed by the individual, and especially is always afflictive even when it limits itself to defence by the segregation of the most dangerous ones, and even when it has for its purpose the social re-education of the less dangerous ones.'[2] It may be noticed that in the above passage Ferri reiterates the view that though a 'measure' may in fact be afflictive, it is not adopted or executed in the spirit and for the purpose of repression. The primary purpose of a 'measure', namely, segregation or social re-education, is not to be thrown into the background so as to give prominence to repression and thereby to create an anomaly which cannot be called a measure of safety in the true sense of that term.

[1] Reference may be made in this connexion to a brief and interesting sketch of the changes from the pen of Prof. Quintiliano Saldana of the University of Madrid, Vice-President of the Association Internationale de Droit pénal, in the *Revue Internationale de Droit pénal* 1927, part 1, p. 27.

[2] Report presented on behalf of the Italian Branch to the First International Congress of Penal Law held in Brussels, p. 62.

So far as 'preventive punishments' for the incorrigible or the irresponsible are concerned, this view is accepted even by the neo-classical school, and the so-called 'punishments' are recognized as being in truth and in spirit nothing but 'measures' of elimination, segregation, and the like. It is when we seek to apply the measures to the responsible as well as the irresponsible, that the difference emerges and the neo-classicists part company with the positivists. 'It is indeed plain', says Salleilles,[1] 'that punishment, in its proper meaning, produces no effect upon perverted natures, for persons of this type cannot be reached by this measure. . . . But this immunity to the action of punishment is not necessarily irresponsibility. Stoos is content to say—or at least this seems to be his thought—that the repressive measures to be taken against this class have lost their specific character as punishments. For them something else must be adopted, namely, elimination and segregation. But this is not necessarily equivalent to an admission of irresponsibility. *The question is one of definition of punishment*; if it is defined by its psychological effects, Stoos is right. *Punishment for purposes of protection is not punishment in the ordinary sense of the word*; it must be differently administered since it looks to a different end and its effects are no longer the same.' So also Ferri: 'Punishment as a psychological motive can only oppose the psychological factors of crime, and indeed only the occasional and moderately energetic factors; for it is evident that it cannot, as a preliminary to its application, eliminate the organic hereditary factors which are revealed to us by criminal anthropology. Punishment, which has professed to be such a simple and powerful remedy against all the factors of crime, is, therefore, a panacea whose potency is far beneath its reputation.'[2]

[1] *The Individualisation of Punishment*, pp. 146–7.

[2] *Criminal Sociology*, pp. 92–3.

In the above-quoted passage Ferri does assign to punishment a place in the scheme of penology, though not such a large place as it is given by the classical or even neo-classical schools.

Whatever may have been the changes from time to time, it may safely be affirmed that the high-water mark of positivist doctrine and practice is reached when punishment *qua* punishment disappears and is replaced by the instrument of defence and assurance, in other words by measures of safety only; but despite this ideal the positivist school is content for the present with a system which would, while taking the committed act as the starting-point, administer either punishment or measures of safety, or both, in cases and circumstances respectively appropriate for such treatment.

It remains now to be seen how far the positivist ideal as to measures of safety has been realized, or is capable of realization.

3. LEGISLATIVE REALIZATION OF MEASURES OF SAFETY

Among the projected codes of modern times must be mentioned, first and foremost, the famous Italian project of Enrico Ferri (1921) which was conceived with the object of replacing penalties by measures of safety. But he, perhaps, was too far in advance of the times. His attempt, however, paved the way for the less ambitious and more conciliatory project of Alfred Rocco in 1927, which was, as it were, sponsored by the great master.

The fundamental difference between Rocco's project and the other European projects lies in this: whereas in all the other projects an endeavour is made to fit into a classical framework diverse provisions relating to measures of safety, Rocco's project makes a bold departure in dividing the code into two parallel parts wherein punishments and measures of safety find their respective places,

and are designed to subserve their respective functions. As has been observed, 'What is of the greatest interest at the present moment is the method followed by the Italian project in treating the general regulations on measures of security in a parallel manner to those on penalties.'[1]

Incidentally, this parallelism takes the mind back to the Italian Penal Code of 1889, which, though for a different purpose, introduced the innovation of 'parallel punishments'.[2] The object was to have two scales of punishments, the one entailing a far more rigorous and exacting discipline than the other, and the application of the one or the other was to be in accord with the subjective criminality evidenced by the offender. This was further developed in Mancini's draft, which gave the judge the power to take account of motives, and to substitute one set of punishments for another accordingly. This judicial discretion would obviously involve a close scrutiny by the judge of the psychological character of the offender in order to apply the punishment suitable to him, and, consequently, the requisite knowledge and training on the part of the judge to enable him to carry out this function properly. On this system of parallel punishments M. Saleilles very pertinently observes: 'It is clearly a step in advance. It evidences the growing movement towards subjective penal law, i.e. towards the penal law that is more humane and more considerate of the individual. The eyes of Justice have too long been bandaged and prevented from seeing the position of her scales; and this has given

[1] See 'The Codification of Measures of Security', by W. Makowski, Professor of Warsaw University, in *Revue pénitentiaire de Pologne*, January–April 1929, p. 80.

[2] The criminologists who originated the theory started from a well-known precedent: the recognition, with reference to the material crime, of two standards of punishment, the one applicable to political crimes and the other to common law. *The Individualisation of Punishment*, p. 254, where will be found also important references to M. Garçon's contributions to this question in *Revue pénitentiaire*, 1896, p. 830 et seq., p. 1099, and p. 1407 et seq.; also 1897, p. 144.

rise to many injustices. The bandage must be removed. Justice must be given sight, and insight, that shall be adequate to probe the human conscience, not to find the freedom of action—for this, Justice is not equipped—but to sound the moral depth of the offender, a service to be readily and even scientifically performed. The system of parallel punishments is a protest against abstract, impersonal justice, which was the ideal of the former generation, but which we reject because we know its results; criminals by birth who scorn it, or chance offenders whom it brands and ruins. The bandage on the eyes of Justice protects the perverts and degrades the chance offenders. The former welcome and find support in it, the latter find in it their despair. We demand a justice that sees clearly, that treats perverts as perverts, and the wayward as wayward—as redeemable members of society.'[1]

The system of parallel punishments mentioned above was, as Saleilles says, a protest against abstract impersonal justice. Similarly, the system of legislation in which punishment and measures of safety run parallel to each other is a form of protest against an abstract and mechanical application of punishment in all cases without discrimination, and also an endeavour to apply punishment to those cases, and those only, where correction through it is rationally to be expected, and measures of safety to those cases only where it is appropriate—'measures of safety' being taken as a comprehensive term of criminal economics including a variety of measures of social defence varying with the circumstances of each case and the personality of the offender.

Now the application of one or the other would involve as a necessary preliminary a classification of offenders in the mind of the judge, who is called upon to administer the law. Hence the classification of the delinquents in the new projected Italian Code which is based on the classi-

[1] *The Individualisation of Punishment*, p. 265.

fication in Ferri's project of 1921, is a point of the greatest importance. As an illustration it is interesting to notice the implication of an habitual criminal, '*délinquant par tendance*', which arises out of Article 21 of the Project. 'En effet,' writes Enrico Altavilla, 'la norme du no. 3 art. 21 disant que "les conditions normales, organiques et psychiques, avant, durant et après le délit qui ne constitue pas un acte de folie et qui révèle des tendances criminelles" (ce qui prépare la formule "délinquant par tendance") devra être complétée par celle du no. 4 "précocité à commettre un délit grave", du no. 5 "motifs ignobles et futiles", du no. 7 "préparation pondérée du délit", du no. 16 "conduite reprouvable après le délit, et arrivera de cette façon à réunir le total des symptômes qui constituent l'individualité du "délinquant par tendance".'[1]

Now consider the main features of the Italian project of 1927.[2] It is by no means a perfect piece of legislation. Its blemishes and shortcomings have formed the subject-matter of just and straightforward criticism, but the defects, such as they are, may well be passed over in view of its main achievement, namely, presenting in a codified form a scheme whereby punishments and measures of safety may be administered on parallel lines. Chapter ii of part vii of the general part of Rocco's project is the portion of the Code that specially relates to measures of safety. This chapter is divided into two sections—the first, i.e. articles 200 to 215, being concerned with special provisions as to measures of safety. These latter set out in full detail the different forms of measures of safety, the specific cases, and the kinds of offenders to which they are applicable, the special rules to be observed as to their mode of execution, their duration, cancellation, substitu-

[1] See an article by Enrico Altavilla, Professor of the University of Naples, in *Revue pénitentiaire de Pologne*, January 1928, p. 7.

[2] It has since been passed as law by the Fascist Government.

tion, &c. A comparison of some of the articles dealing with general provisions as to measures of safety with corresponding articles in the general sections relating to penalties will disclose the parallelism which characterizes the project. Article 1 of the project deals with the legal foundation of punishments. It states that nobody can be punished for commission of an act which is not specifically mentioned by the law as being punishable, or by means of a penalty not laid down by the law. Article 200 of the project states in a similar manner that nobody can be submitted to a measure of security which is not specifically laid down by the law, or in cases which are not provided for by the law. Thus these articles lay down that the fundamental principles in regard to punishments and measures of safety are the same, namely, *nullum delictum sine lege*. Similarly, article 2 of the project, dealing with the duration of the punishment and adaptation of the magnitude of the penalty to the criminality of the act, lays down that such adaptation is to be determined solely by the law in force at the time of commission of the offence. Article 201, dealing with the same question from the point of view of measures of safety, lays down that 'Measures of security should conform to the law in force at the moment of their execution'.

The illustrations given above would at first sight seem to indicate that little or no room is left for judicial discretion, but a reference to articles 203 and 204 dispels this impression. They provide that a measure of security, except when provided for by a special law to the contrary, can only be applied to persons who are dangerous from the point of view of society, and who have committed an act covered by law, even if they are not responsible, or if they are exempted from punishment. Thus, with the exception of cases where a special law presumes the dangerousness of the criminal, the judge is called upon to

exercise his discretion, and with the aid of knowledge of psychology, sociology, and human affairs in general, to come to a conclusion as to the dangerousness of the offender at the time when the act in question was committed, that is to say, whether the condition was such as to present a permanent danger to society by reason of the likelihood of his committing new offences, or of his infecting his neighbours with the germ of criminality and, in general, of undermining social order. Articles 205 to 215 of the project confer upon the judge further discretion regarding the application of the measure of safety, side by side with that of a penalty, its suspension and withdrawal, and other problems which necessarily arise in the administration either of penalty or of measure of safety respectively, and which call for different methods of execution.

It is this feature of the Italian project which led Ferri to prophesy that the project would act like an injection of pure and oxygenated blood into the science and practice of penal justice, for, as he observed, the very application of article 204 would necessitate a knowledge on the part of a judge of psychology and criminal anthropology to enable him to distinguish the criminal by instinctive tendencies from the occasional criminal, the 'passional' and the insane criminal, and the criminal by habit or profession.'[1]

[1] 'Cette injection de sang pur et oxygéné que le Projet Rocco introduit dans la science et dans la pratique de la justice pénale relative aux délinquants apportera certainement à notre pays un nouvel élan dans les études de l'anthropologie et de la psychologie criminelle, qui sont déjà une gloire de la science italienne. Quand vous pensez que l'art. 104 du Projet Rocco admet l'existence d'un délinquant par tendance instinctive, c'est-à-dire en autres termes d'un délinquant né, comme je l'ai baptisé après qu'il fut étudié et découvert par Lombroso, quand ceci est admis dans un Code pénal—et que le juge est obligé d'appliquer les peines d'une manière différente et de joindre les mesures de sûreté, s'il est persuadé que l'inculpé et le condamné est un délinquant par tendance instinctive, vous comprenez qu'il faudra bien que les juges, afin d'appliquer le Projet Rocco, connaissent un peu la psychologie et l'anthropologie criminelle pour distinguer le délinquant par tendance instinctive du délinquant occasionnel, du

Enrico Ferri, than whom there was scarcely any one better able to gauge the distinctive characteristics of the Italian project, after fully considering its historical background and the important factor of the Fascist Revolution, points out that this legislation reveals the following four essential traits: firstly, the project strengthens the social defence against criminality and makes it more efficacious.[1] In this respect, he observes, the Fascist school and the positivist school are in entire accord. Secondly, the project maintains two traditional conceptions: (i) the presumption that the threat of juridical responsibility and of punishment may act as a mode of intimidation, (ii) the principle of moral responsibility of the delinquent expressed by the classical distinction between criminals who are morally responsible and those who are not. For the former is prescribed punishment proportionate to the delict and for a determinate term; for the latter, measure of safety (*peine-défense*) for a term indeterminate and revocable by the will of the judiciary. It is in the maintenance of these two traditional principles—the efficacy of intimidation and the basis of moral responsibility—that there is divergence between the positivist school and the new project. For the positivist asserts that the effect of intimidation is much less than is generally believed. This is met by Alfred Rocco with the following argument: The whole of society, he observes, may be divided into three groups—a feeble minority at the two extreme points; namely, the virtuous on the one side and the depraved on the other,

délinquant passionnel, du délinquant fou ou du délinquant par habitude et de profession.' See 'Le Projet Rocco de Code pénal Italien' in *Revue pénitentiaire de Pologne*, July 1928, pp. 160–1.

[1] 'Or, le projet Rocco ne vise pas seulement à renforcer la défense sociale contre la criminalité par rapport aux délits, p.e. délits contre la morale publique, contre l'économie nationale, mais il applique également cette efficacité accrue d'une défense sociale par rapport aux délinquants (fous, délinquants par habitude, par tendance ou criminels nés)'. *Revue pénitentiaire de Pologne*, July 1928, p. 156.

with an immense majority in the middle. It is on these last, who are neither too virtuous nor too depraved to be above the effect of punishment, that intimidation may have some influence. Thirdly, the new project joins measures of safety to punishments. These measures of safety are not only for delinquents who are morally irresponsible, but also for the responsible by way of exception. Consequently, measures of safety receive a legal status and have the force of legal sanctions. Fourthly, thinks Ferri, there is enough in the Code to justify the expectation that it will drive forward Italian legislation to a point farther than the present project permits. The result of this driving-force will be gradually to replace moral by social or legal responsibility, thereby giving to measures of safety a complete legal standing.[1]

It is by these arguments that Ferri, with the sanguine temperament of a pioneer, concludes that, notwithstanding the conservation of the principle of moral responsibility in Rocco's project, there will surely come the day when the principle of social or legal responsibility will in due course be accepted in its entirety and, consequently, measures of safety will form the sole comprehensive code of sanctions, as he foreshadowed in his own project of 1921.[2]

At the Conférence internationale de Codification de Droit pénal, held at Warsaw in 1927, out of twelve codes of Penal Law which were actually on the anvil at the time in Europe, seven were taken into consideration, namely the Italian, the Spanish, the Roumanian, the Czechoslovakian, the Serb-Croat-Slovenian, the Greek, and the

[1] He sums it up thus: 'Criminal justice having no means of measuring man's moral guilt, which only the omniscience of God can discern, leaves to moral philosophy, to religion and to common sentiment the task of appraising the degree of moral guilt and concerns itself only with recourse to measures of social defence.' *Revue internationale de Droit pénal*, 1928, part 1, p. 58.

[2] See 'Le Projet Rocco de Code pénal Italien', *Revue pénitentiaire de Pologne*, July 1928, pp. 156–7.

Polish, and it was found that all the above codes purported, in a greater or a lesser degree, to join measures of security to punishments, which had till recently constituted the sole form of penal justice. The same observation applies to the codes or projected codes of Germany, Austria, Switzerland, Sweden, and Denmark, which were not placed before the Warsaw Conference. To mention others, most of the States of North America (by special law), Norway, Argentina, Peru, and Cuba, either by projected codes or codes enacted, have followed the same course and provided punishments for the morally responsible and measures of safety for delinquents not morally responsible, but none the less dangerous.

There is one piece of legislation which in certain respects stands pre-eminent, and presents an interesting subject for comparative study side by side with the Italian project. It is the new Russian Penal Code of 1927. It claims to have completely replaced punishments by measures of security. If this claim were well founded, it would beyond question be one of the most advanced codes of the present day. Opinions have differed as to whether the Code can justify its claim to have systematized measures of protection in such a comprehensive and scientific manner as not only to banish from the domain of law the conception of penalty, but also the distinction between the morally responsible and the morally irresponsible, thus leaving a place for only legal responsibility. No doubt the Soviet Code succeeded in obtaining colour for this claim, inasmuch as the words 'penalty' and 'punishment' find no place in it. But that is easily accounted for, as Mokowski points out, by the fact that 'the penal or criminal code in the Russian language is known as the "capital code", and not only in Soviet Russia, for it has also been known under that title since the Middle Ages (*ongolvnyj kodeks*)'.[1] The

[1] *Revue pénitentiaire de Pologne*, Jan.–April, 1929.

only way to test it would be to examine and see (i) what is the avowed purpose of measures of safety in the Soviet system; (ii) what are the juridical guarantees, if any, of their application; (iii) what is the character and content of these measures which are alleged to replace penalties; (iv) what is the wisdom, or unwisdom, of the modes of application prescribed. If the Code does not survive the application of these tests, it cannot justly be held up as a model by reason only of the fact that terminologically it has attained perfection by dispensing with the word 'penalty'.

Now (i) as to the purpose of the legislature, we are told that 'Measures of social defence are applied for (*a*) preventing the commission of new crimes by former offenders, (*b*) influencing other persons who are a potential element of disturbance to society, (*c*) adapting criminals to conditions of life in the proletarian state' (art. 9). It is obvious that this conception of measures of social defence is entirely foreign to the mind of Ferri or any other positive penalist. The definition is based on the theory of intimidation and on the deterrent effect of punishment. Indeed, if the word punishment were substituted for the expression 'measures of social defence' the definition would fit in with the spirit and framework of any penal code of the classical school. There is thus something fundamental in the Code which disentitles it from being regarded as a real advance towards establishing the primacy of 'measures' as distinguished from penalties or punishments.

Again (ii), the juridical guarantees against excessive application of measures of security, which are so well provided in the Italian Code, are conspicuous by their absence in the Soviet Code. A reference to a few of the articles will show that they lay the axe at the root of such guarantees. Article 46 of the Code divides the offences under the Code into two classes: (*a*) Offences against the basis of the Sovietist organization established in the Union by the

authority of workmen and peasants and considered accordingly as being the most dangerous; (*b*) all other offences. Article 16 provides that 'when an act constituting a danger to society is not expressly mentioned in the Code, the measure of importance and the foundations of responsibility for such act shall be determined regard being had to the provisions of the Code relating to those offences which are most nearly analogous'. This provision, as Ferri points out, runs quite counter to the wholesome maxim *nullum delictum sine lege*, which is an essential guarantee against judicial and executive abuses. Read with article 7 the above article becomes all the more dangerous. Under article 7 all measures of social defence are applicable not only to persons guilty of acts constituting a danger to society (art. 1), but also to persons who are dangerous owing to their association with a criminal milieu, or on account of their past record. This takes away the last vestige of safety which the legislature is expected to ensure for each citizen.[1]

(iii) As to the character and content of the measures which are supposed to replace penalties, a study of a few of the articles discloses that the measures are no more than

[1] Note Ferri's criticism on this aspect of the Code: 'The fundamental standard of social defence against criminality clearly comprises measures of prevention (*ante-delictum*). And it is invariably the State which organizes and adapts the one and the other in juridical form and order. But the need for a division of the work of providing for social defence requires a distinction to be drawn between laws of prevention (police measures of security) and laws of repression (penal justice). The first are concerned with individuals who are "socially dangerous", the second with those who are "criminally dangerous". It follows that there should be, as a matter of necessity, different standards and different measures according to whether it is a question of prevention or repression. Consequently, in a penal code dealing with danger *post delictum*, rules which belong to the category of police measures are out of place. It is the more impossible to approve art. 7 because art. 16, as we have seen, introduces the principle of analogy (which can be admitted in regard to measures of prevention), in the case of repressive sanctions, with the result that the citizen cannot know with certainty all the acts which are punishable by the penal code.' *Revue internationale de Droit pénal*, part 1, 1928, p. 61.

the old-fashioned penal remedies appearing under the title of measures of safety. The measures of social defence laid down in the Russian Soviet Code are of three classes: (i) Medico-pedagogic, (ii) Medical, and (iii) Judicial-correctional. The first are applicable to minors, and consist of (*a*) tutelage of parents or other guardians or institutions, (*b*) internment in a medical educational reformatory. The second, namely, medical measures, are applicable to persons mentally deranged, whether chronically or temporarily, or those suffering from any disease such as would make them not accountable for their actions or incapable of controlling them (art. 11). These measures consist of internment in a curative institution and compulsory confinement and treatment there (art. 24). The judge has the discretion to apply the first or the second where he thinks that the third is inapplicable (art. 25). The third, i.e. measures of a judicial-correctional character, are not to be applied to young persons of less than 14 years of age, who are to be subjected to medico-pedagogic measures. But judicial-correctional measures shall be applied to young persons between the ages of 14 and 16 in those cases only where the Juvenile Delinquent Commission considers it impossible to apply measures of a medico-pedagogic character (art. 12). So far so good. It is when we come to details of the third class of measures, the judicial-correctional, that the character and content of the measures as contemplated by the Code become more apparent. The judicial-correctional measures are enumerated in article 20 of the Code. There we find that, apart from public reprimand, fine, warning, and payment of damages, which are nothing out of the ordinary, the measures are set out as follows: Proclamation as an enemy of the proletariat, together with deprivation of citizenship of the U.S.S.R. and expulsion from the territory of the State; imprisomnent in a cell; hard labour without confinement; loss of political

and of certain civil rights; temporary banishment; restriction of residence; loss of employment, and ban on employment; ban on the exercise of one's profession; total or partial confiscation of property. But this is not all. Article 21 adds a special measure for certain grave offences—and that is no other than execution by shooting —in the following terms: 'In order to combat the gravest crimes constituting a menace to the basis of the Soviet power and of the Sovietist State, until such time as this enactment may have been repealed [1] by the Central Executive Committee, in the cases specially provided for by this code, the penalty of death by shooting shall (except as against young persons whose age does not exceed 18 and of women in a pregnant condition) be applied as an exceptional measure for the safety of the proletariat State.'[2] Add to all this the provisions of article 16, which invokes, as mentioned above, the principle of analogy, and article 7, which provides that all measures (i.e. judicial-correctional, medical, and medico-pedagogic) are applicable not only to persons guilty of acts making for danger to society but also to persons who are dangerous owing to their association with a criminal milieu, or on account of their past record. The picture is now complete of a system of law which no doubt may claim the credit of doing away with the use of the word 'punishment' in the Code, but which can scarcely claim to have done away with punishment itself. The essence of the whole Code, with the exception of a few provisions with regard to minors, appears to be intimidation.

[1] This has elicited from Makowski the following criticism: 'Le fusillement est institué "jusqu'à l'abrogation" comme si toute autre loi n'était pas valide que jusqu'à son abrogation.'

[2] Ferri sees in the provision of this article a parallel of the Italian legislation of 25 November 1926, whereby 'as a consequence of the four attempts committed in twelve months on the life of Benito Mussolini the death penalty has been re-established for a period of five years in the case of attempts to take the life of the King and his Prime Minister'.

It may be regarded as temerity to advance this criticism when no less a person than Enrico Ferri has welcomed the code and blessed it.[1] But his attitude is accounted for by the fact that, a prophet and pioneer as he was, he would welcome any step, however faltering it might be, towards making measures of safety the sole sanction of penal justice.[2]

Lastly (iv), as to the modes of application of the measures, it is unnecessary to enter into a detailed discussion of them. It is sufficient to indicate the five defects as pointed out by Ferri himself.

The five defects are:

'(1) The failure to distinguish between the danger as a criminal (post-delictum) and the danger to society (ante-delictum), which the offender represents. (2) The application of measures for the protection of society either for a fixed period or for practically an indefinite term. (3) The retention of sanctions which are either useless or unsuitable. (4) The application in the case of juvenile offenders of protective measures merely according to age, and not according to personality. (5) The frequently occurring failure to keep in view the subjective standard (the personality of the criminal) in its relation to the objective standard (the degree of gravity attaching to the offence).'[3]

[1] See *Revue internationale de Droit pénal*, 1928, part 1, pp. 50–63.

[2] It is but fair to reproduce here the following summary by Prof. Ferri of the points of excellence in the Code: 'The first and fundamental characteristic of the Code is its adoption in the completest form of the governing root-principle that all criminals are legally responsible for their crimes, the application of this principle being naturally subject to the adaptation of the measures for the protection of society to the personality of the offender. The second characteristic is the distinction between ordinary or common law offenders and political offenders. The third characteristic is the right of the Court to pardon'. *Revue internationale de Droit pénal* 1928, part 1, pp. 53–4.

[3] *Revue internationale de Droit pénal*, 1928, part 1, p. 54.

4. PROGRESS OF THE MOVEMENT BY INDIRECT ROUTES

The course of the progress of measures of social defence on the Continent presents an interesting study. It is but natural that Italy—the home of speculation which has from Beccaria onwards developed system after system of criminology—should also have foreshadowed a comprehensive code of Penal Law combining the parallel claims of punishments and measures of safety—an idea that seems to be leavening the jurisprudence of other states in Europe. France, with her strong contingent of penalists like Tarde, Saleilles, Garraud, and Fouillée, has adhered to her theory of penal responsibility, although it has been to a great extent transformed by the introduction of the principle of identity (Tarde and Saleilles) or the principle of defence of the social organism (Fouillée). She has endeavoured to introduce into her juridical and legislative system the humanizing principle of individualization on the maxim tersely enunciated by Saleilles, 'Responsibility as the basis of punishment and individualization as the criterion of its application: such is the formula of modern law.'[1] Saleilles formulates this proposition from the standpoint that responsibility, being based not on free will but on the identity of self or personality, does not disappear with the disappearance of scientific faith in free will. Thus free will passes away, yet responsibility remains as the basis of the concept of punishment. Individualization becomes merely the criterion of its application. 'Freedom is thus the personality itself, in so far as it is capable of detachment from the organism that serves as its instrument, and thus comes to live its true life and to influence character and all the latent reserve forces that favour virtue and oppose vice.'[2] Again, 'The concept of punishment implies responsibility. One must

[1] *The Individualisation of Punishment, p.* 181. [2] Ibid., p. 175.

believe in responsibility in order that a measure taken against an offender shall be a punishment. But the application of punishment is no longer a matter of responsibility, but of individualization. It is the crime that is punished, but it is the consideration of the individual that determines the kind of treatment appropriate to his case.'[1] This individualization has made steady progress and has culminated in the law of parole, associated with the name of Bérenger, and diverse other developments in that direction. We thus meet with the interesting phenomenon that, though clearly distinguishable by its theoretical starting-point, the French school is by a different route approaching the same practical goal—measures of safety. The same may be said of Germany, always true to her philosophical genius for accuracy and insight and to her aptitude for systematization. The result has been a gradual building-up of legislative sanctions paving the way for a larger and larger scope for measures of social defence.

Take again the so-called 'Reformers'—Liszt, Prins, van Hamel, and others. In effect, their thoughts and activities are directed, though not in such a thoroughgoing manner as those of the positivist school, to the achievement of the same end. As Bernaldo de Quiros puts it, 'The Reformers are noted for planning a kind of "double entry" penology. They advocate the traditional penal measure with a repressive aim for certain delinquents only, while for others they reserve preventive measures against relapse and imitation, in accordance with the teachings of modern criminology.'[2]

[1] Ibid., p. 181. See also pp. 151, 154, 169.

[2] *Modern Theories of Criminality*, p. 130. Concerning the extent of the influence of this school see p. 131 of the same work, quoted above, p. 50, note. See also pp. 131–2 for the statement of principles of the International Union of Criminal Law, founded in 1889, by Liszt, Prins, and van Hamel, for the promotion of Reforms, which lays down *inter alia* that 'criminality and the means of repression must be examined from the social and juridical point of view'.

5. PROGRESS OF MEASURES OF SAFETY IN GREAT BRITAIN AND AMERICA

In England, too, the progress of views as to measures of social defence has been a gradual but steady advance. Its trend has, however, been in a different direction. The beginning was practical work in prisons—what may be called administrative actualization of measures of safety. It then began to affect judicial decisions and the verdicts of juries. This may be called the judicial phase. Last of all came the legislative phase of the process. What is termed *individualisation de la peine* is really a mode of expressing in a comprehensive manner all the different stages involved in adapting the punishment to the criminality of the offender; namely, ascertaining the measure of criminality of offenders by classifying them into child or juvenile, juvenile or adolescent, habitual, 'passional' or occasional, first offenders or recidivists, responsible or irresponsible, and so on; deciding with what class a particular offender should be grouped, and thus adjudicating whether punishment (for repression) or preventive measures (for social defence) should be applied. All this bears a strong family resemblance to the parallel progress of measures of safety with punishment on the Continent. The Anglo-Saxon instinct for reality of facts and strong practical sense in grappling with them are responsible for reversing the order, and proceeding not from legislation to practical reform but from practical reform first to legislation afterwards. It may also be observed that the course generally followed in the other countries of Europe (as distinguished from Great Britain) is of a piece with the trend of thought on the Continent, where the judge is not empowered to act on his own authority, but is in the habit of receiving detailed instructions from the legislature. Unlike the Anglo-Saxon systems, which vest in the judge an ample discretion such as would enable

him to interpret (and thereby amplify and adjust) the law in consonance with custom and experience, most of the continental systems would rather pin him down to statutory provisions and allow him somewhat of an executive role in carrying out the law as it stands in the statute-books.[1]

6. THE CONCEPTION OF TUTELAGE, THE BASIS OF MEASURES OF SAFETY

The tendency, thus manifest all over the civilized world, of measures of social defence gradually encroaching upon the domain of punishment, is perhaps not a little due to interchange of ideas among the nations. These measures in course of time develop into various classes not only defensive in relation to society, but reformative and protective with reference to the individual. Indeed, the bulk of them to-day have at bottom the idea of tutelage of the offender under the State. It is difficult to point out the exact beginnings of this idea in modern Penology. But if Bernaldo de Quiros is to be believed, 'It is to Roder that we must trace the beginning of the movement of penal transformation, which, changing punishment into tutelage, makes of it a branch of reformatory education.'[2] The

[1] Bernaldo de Quiros notes a change in this respect: 'Judicial discretion is regaining what it had lost, and rids itself of the unfortunate note as the magistrate gains in science and conscience. The latest approved codes and drafts which are being drawn up everywhere bear witness to what has been said. It suffices to give a glance at the Dutch Code, which is pointed out as a model, to see that judicial discretion is such that the magistrate can pass from the maximum penalty of life imprisonment to the minimum one of a single day'. *Modern Theories of Criminality*, p. 177.

[2] *Modern Theories of Criminality*, p. 127. See also p. 126, where the basis of the view is indicated: Karl Roder (1806–79) began 'in 1839 a series of writings aiming at bringing the conception of penology back to the universal law of tutelage over deficient beings'. The doctrine takes into consideration the state of the will out of harmony with justice, pointing the way to the cause of the crime, and recognizes the consequent necessity of a tutelage 'not only in its restrictive sense of decreasing the criminal's exterior freedom, so as to diminish the stimulus and the opportunities that cause him to persist in his condition, to relapse and to grow worse, but also in its positive sense—which is always the first—

International Congresses[1] held at different centres from time to time and the activities and literature of national societies such as the Howard Association of England, the Société Générale des Prisons of France, the American Prison Association, and the recently founded Association internationale de Droit pénal have further succeeded in making knowledge and experience in the field of penology and criminology universal property, challenging their universal examination and scrutiny, and facilitating their assimilation and adoption in different countries according to local conditions.

Although, therefore, we do not see in England or the United States one entire and comprehensive code of Penal Law drafted or enacted, as in some of the countries of Europe above mentioned, making punishment and measures of safety run on parallel lines as two independent parts of the same system, we find legislative enactments from time to time supplementing the existing law and demonstrating the growing importance of measures of defence and tutelage as distinct from punishments. It is, however, a matter of fundamental importance, whether the measures of tutelage under the State are being applied not only to the so-called irresponsibles but also to those hitherto called 'responsible', and now more and more regarded as deserving of tutelage on the ground that they suffer from some abnormality which accounts for their being at war with law and order. This is the encouraging

of protecting the development of his freedom, the repression of his will, the regeneration of his conscience, the restoration of the sense of justice in his soul, and his energy and strength in the realization of his deeds'.

[1] Beginning with those of Frankfort (1846 and 1857) and Brussels (1847) and thereafter held in succession in London (1872), Stockholm (1878), Rome (1885), St. Petersburg (1890), Paris (1895), Brussels (1900), Budapest (1905), Washington (1925), and London (1925), followed by the Premier Congrès International de Droit pénal in Brussels (1926) and in Bucarest (1929) with the various subsidiary Conferences organized under its auspices. See Ruggles-Brise, *Prison Reform at Home and Abroad.*

feature of the history of penology of recent years. The process has been one of gradually contracting the circle of the 'responsibles', so that in course of time more and more of the offenders and law-breakers are coming within the scope of State tutelage rather than of punishments.

7. EXPANSION OF TUTELAGE—A SLOW GROWTH

The change in outlook even concerning the quasi-irresponsibles, such as adolescent offenders, has come about very slowly, as Sir Evelyn Ruggles-Brise vividly portrays in his work *The English Prison System*. When the Parliamentary Committee appointed in 1847 to inquire into the question of juvenile crime was confronted with the wonderful work of the authorities of the Stretton Colony, and their experience that 60 per cent. of the juveniles between the ages of 16 and 20 might be permanently reformed and restored to society by means of proper measures, the Committee 'formally consulted the High Court Judges as to the possibility of introducing a reformatory element into Prison Discipline. The High Court, speaking in the name of its most distinguished members, Lord Denman, Lord Cockburn, and Lord Blackburn, declared reform and imprisonment to be a contradiction in terms and utterly irreconcilable. They expressed a doubt as to the possibility of such a system of imprisonment as would reform the offender, and yet leave the dread of imprisonment unimpaired'.[1] Again as late as 1863, the memorandum appended to the report of the Royal Commission by Lord Chief Justice Cockburn reiterates the primacy of punishment. In laying down his views as to the purposes of punishment generally, he observes: 'These purposes are twofold; the first, that of deterring others exposed to similar temptations from the commission of crime; the second, the reformation of the criminal himself. The first

[1] *The English Prison System* (Macmillan & Co., London, 1921), p. 89.

is the primary and more important object, for though society has, doubtless, a strong interest in the reformation of the criminal and his consequent indisposition to crime, yet the result is here confined to the individual offender, while the effect of punishment, as deterring from crime, extends not only to the party suffering the punishment but to all who may be in the habit of committing crime, or who may fall into it.[1] Moreover, the reformation of the offender is in the highest degree speculative and uncertain, and its permanancy, in the face of renewed temptation, exceedingly precarious. On the other hand, the impression produced by suffering, inflicted as the punishment of crime, and the fear of its repetition, are far more likely to be lasting, and much more calculated to counteract the tendency to the renewal of criminal habits. It is on the assumption that punishment will have the effect of deterring the crime that its infliction can alone be justified, its proper and legitimate purpose being not to avenge crime but to prevent it. The experience of mankind has shown that, though crime will always exist to a certain extent, it may be kept within given bounds by the example of punishment. This result it is the business of the lawgiver to accomplish by annexing to each offence the degree of punishment calculated to repress it. More than this would be a waste of so much human suffering; but to apply less out of consideration for the criminal is to sacrifice the interests of society to a misplaced tenderness towards those who offend against its laws. Wisdom and humanity, no doubt, alike suggest that if, consistently with this primary purpose, the reformation of the criminal can be brought about, no means should be omitted by which so desirable an end can be achieved. But this, the subsidiary purpose of Penal Discipline, should be kept in due subordination to its primary and principal one. And it may well be

[1] Cf. Chap. v, pp. 59–61 *supra*.

doubted whether, in recent times, the human and praiseworthy desire to reform and restore the fallen criminal may not have produced too great a tendency to forget that the protection of society should be the first consideration of the lawgiver.'[1] In strong contrast with the above is the statement of the Home Secretary (Mr. Churchill) in the House of Commons in 1910, which represents the change in the point of view: 'The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. A calm, dispassionate recognition of the rights of the accused, and even of the convicted, criminal against the State; a constant heart-searching by all charged with the duty of punishment; a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment; tireless efforts towards the discovery of curative and regenerative processes; unfailing faith that there is a treasure, if you can only find it, in the heart of every man—these are the symbols, which, in treatment of crime and criminal, mark and measure the stored-up strength of a nation, and are sign and proof of the living virtue in it.'[2]

[1] Quoted by Sir Evelyn Ruggles-Brise in *The English Prison System*, pp. 32–3.
[2] *The English Prison System*, p. 4.

VII

MEASURES OF SAFETY AS THE GOAL OF PENOLOGY (*Continued*)

1. CONSEQUENT CHANGES IN THE ADMINISTRATIVE, JUDICIAL, AND LEGAL MACHINERY

IN order to form an estimate of the extent to which this change in outlook has led to a corresponding change in administrative, judicial, and legal machinery, various facts must be considered. It is not the purpose of this work to deal in detail with all the changes that have been brought about, but only with a few of the typical ones.

2. THE BORSTAL SYSTEM

The Borstal is undoubtedly one of the leading types. Here there is the refreshing spectacle of Great Britain availing herself of the new methods employed in the New World and adapting the measures concerning adolescent offenders in the United States to her own particular conditions and requirements. One can do no better than quote the words of Sir Evelyn Ruggles-Brise himself, who was the pioneer of the movement and who has been for many years its mainstay and principal pilot: 'My experience and observation had already led me to form a very strong opinion of the penal law, which classified forthwith as adult criminals lads of 16, as unjust and inhuman. I obtained the authority of the Home Secretary, Sir M. Ridley, who was in warm sympathy with my views, to go to the United States in 1897 to study at Elmira the working of what is known as the American "State Reformatory System". The annual reports of the authorities at Elmira had begun to attract considerable attention in Europe. The American System classified as youths all persons between the ages of 16 and 30. While we classified our

boys as adults, the American adopted the converse method, and classified his adults as boys. I thought myself that the truth lay midway between these two systems, between the system that ends youth too early and that which prolongs it too late, between the voluntary system of England and the State Reformatory System of the United States. The point I was aiming at was to take the "dangerous" age, 16 to 21, out of the Prison System altogether, and to make it subject to special "Institutional" treatment on reformatory lines.

'I was impressed by all that I saw and learnt at the principal State Reformatories of America, at that time chiefly in the States of New York and Massachusetts. The elaborate system of moral, physical, and industrial training of these prisoners, the enthusiasm which dominated the work, the elaborate machinery for supervision of parole, all these things, if stripped of their extravagances, satisfied me that a real, human effort was being made in these States for the rehabilitation of the youthful criminal. It was on my return that, with the authority of the Secretary of State, the first experiments were begun of the special treatment, with a view to the rehabilitation of the young prisoners, 16 to 21, in London Prisons. A small Society was formed, known as the London Prison Visitors' Association, to visit these lads in the London Prisons: (they were removed later, as stated, to the old Convict Prison at Borstal). The procedure was to visit Borstal by roster each month, and interview the cases about to be discharged in the following month, so that the best arrangements might be made. Out of the small body of visitors sprang the Borstal Association, and it is interesting now, looking back to that time, to recall the circumstances under which this Association was founded. There was in the public mind a great confusion as to the exact meaning of the phrase "Juvenile Offender". The ambiguity has

since been largely cleared up by the definitions of the Children Act, but at that time there was a confusing medley of appellations; and children, young persons, and youthful offenders, were all jumbled together in the same category. The specific proposal was to deal with the age 16 to 21, and it was decided, in order to emphasize this fact and make a clear distinction between this age and all other ages, to make use of the word 'Borstal', that is the name of the village where the experiment was being carried out. I think that this appellation has been singularly fortunate in its results, as it has made it quite clear that we are not dealing with the youthful offender as usually conceived, that is, a boy, or even a child, who may have lapsed into some petty or occasional delinquency, and who was being sufficiently provided for by the Reformatory School Acts and by the Rules concerning juvenile offenders in prisons. Our object was to deal with a far different material, the young hooligan advanced in crime, perhaps *with many previous convictions*, and who appeared to be inevitably doomed to a life of habitual crime.'[1]

From the establishment of the Association the measures for the reformation of the adolescent offenders entered upon a definite stage, and the system was put in working order. The Legislature had not yet stepped in to support the measures. Meanwhile, the experience gained in the work of reform proved that time was of the essence of success and that hardly anything satisfactory could be achieved in less than twelve months. In fact, even a longer period of detention was necessary for undoing the pre-dispositions and the habits and tendencies of delinquents and for creating in them anything like a set of wholesome ideas and impulses by dint of disciplined training. 'Such a sentence', says Ruggles-Brise, 'should not be less than three years, conditional liberation being freely granted, when

[1] *The English Prison System*, pp. 91–2.

the circumstances of any case gave a reasonable prospect of reclamation and when the Borstal Association, after careful study of the case, felt able to make fair provision on discharge.'[1] It was at this point, when the plan had made fair headway, that legislation assisted to advance the movement. Let the principal actor again speak in his own words: 'It was in 1906, when an experience of four or five years had established these principles, that I addressed a strong representation to the Secretary of State, asking for an alteration of the law on these lines: and in 1908, thanks to the cordial agreement with these views manifested at that time both by the Secretary of State (Lord Gladstone) and the Chancellor of the Exchequer (Mr. Asquith), these principles became law under the Borstal Act of 1908. The system in vogue to-day is a legal system: it has passed beyond the experimental stage, and has become a part, an important part, of the criminal law of this country, and not of this country only, but is a prototype of analogous Institutions which have been established in many parts throughout the civilized world. The system as it operates to-day is the same in its leading features as the experimental system prior to the Act.'[2]

The Prevention of Crime Act, 1908 (8 Edw. VII, c. 59), which described itself as 'An Act to make better provision for the prevention of crime, and for that purpose to provide for the reformation of young offenders and the prolonged detention of habitual criminals and for other purposes incidental thereto' was a short Act, Part 1 of which was entirely concerned with the measures relating to adolescent offenders. It was provided (sec. 1) that where a person was convicted on indictment of an offence for which he was liable to be sentenced to penal servitude or imprisonment and it appeared to the Court (*a*) that the person was not less than 16 nor more than 21 years of age;

[1] *The English Prison System*, p. 93. [2] Ibid., p. 94.

and (*b*) that, by reason of his criminal habits and tendencies, or associations with persons of bad character, it was expedient that he should be subject to detention for such term and under such instruction and discipline as appeared most conducive to his reformation and the repression of his crime, it should be lawful for the court, in lieu of passing a sentence of penal servitude or imprisonment, to pass a sentence of detention in a Borstal Institution for a term of not less than one year nor more than three years.' (The period of one year was subsequently extended by the Criminal Justice Administration Act, 1914, to two years.) The Act also provided that the Secretary of State, if he was satisfied that a person undergoing penal servitude or imprisoned in consequence of a sentence passed either before or after the passing of the Act, otherwise satisfied the requirements of the Act as to age, &c., could authorize the Prison Commissioners to transfer him from prison to a Borstal Institution, there to serve the whole, or any part, of the unexpired residue of his sentence (sec. 3). Power was given to the Prison Commissioners, subject to regulations by the Secretary of State, to release on licence any offender after the expiration of six months from the commencement of the term of detention, if a male, and three months if a female, if they were satisfied that there was reasonable probability that the offender would abstain from crime and lead a useful and industrious life, and subject to the condition that he or she would be placed under the supervision or authority of any society or person named in the licence (sec. 5). The Secretary of State was also empowered to establish Borstal Institutions, that is to say, places in which young offenders, whilst detained, might be given such industrial training and other instruction, and be subjected to such disciplinary and moral influences as would conduce to their reformation and the prevention of crime, and for such purpose to incur expenditure which

should be paid out of monies provided by Parliament (sec. 4). Further, the Act took care (see sec. 6) to provide for a period of supervision after expiration of the term of sentence, and the offender was to be under such supervision for six months. (This was subsequently altered to one year by the Criminal Justice Administration Act of 1914.) Lastly, the State tutelage was made complete by providing that any society assisting or supervising persons discharged from Borstal Institutions, either absolutely or on licence, would receive Treasury contributions towards its expenses in that behalf (sec. 8).

The Criminal Justice Administration Act 1914 (4 & 5 Geo. V, c. 58) takes the advance towards measures of safety a step farther. It describes itself as an Act to 'diminish the number of cases committed to prison, to amend the law with respect to treatment of young offenders and otherwise to improve the administration of criminal justice', and purports to take full advantage of the system of probation which grew up at first without any legal sanction and has since progressed with the aid of legislation. It also encourages the establishment of institutions for the care of juvenile offenders and endeavours to bring such institutions already in existence under the supervision of the State by providing for their recognition only when a certain standard of efficiency is ensured. Section 7 of the Act provides that, if a society is formed, or is already in existence, having as its object the care and control of persons under the age of 21 while on probation under the Probation of Offenders Act, or of persons while placed out on licence from a Reformatory or Industrial School, or Borstal Institution, or under supervision after the termination of the period of their detention in such a school or institution, or under suspension in pursuance of the Act, or some one or more of such objects, the society may apply to the Secretary of State for recognition, and the

Secretary of State, if he approves of the society and is satisfied as to the means adopted by the society for securing such objects as aforesaid, may grant his recognition to the society (sub-sec. 1). Where a probation order is made by a court of summary jurisdiction the court may appoint any person provided by a recognized society to act as probation officer in the case (sub-sec. 2). Provision is also made for payment to any such recognized society out of monies provided by Parliament of such sums under such conditions as the Secretary of State with the approval of the Treasury may recommend. In England the whole of the Borstal system is often spoken of as a branch of prison reform. But it is easy to perceive that it comprehends much more than mere prison reform in the restricted sense. In the language of the positivist school, it represents a comprehensive idea of social defence. The substance of the short Act given above shows clearly that the idea of a system of State tutelage and reformation of the offender under that system is gradually modifying, almost replacing, the idea of punishment. The very definition and constitution of a Borstal Institution (sec. 4) implies possibilities of the offender leading a life different from that of a prisoner —a life with more opportunities to deserve freedom, to develop and realize his self-esteem, to come in contact with goodness and to emulate goodness. In reality, a Borstal has turned out to be a sort of modified public school where, apart from breaking in the vicious and the refractory, an earnest endeavour is made to construct a new character for the unfortunate adolescent offender. No wonder that statistics show that 75 per cent. of the inmates are permanently redeemed and do not revert to crime after discharge. Again, the Act gives a large amount of discretion to the judge, with whom it rests to determine in each case whether the prisoner is a fit subject for Borstal treatment or not. Thus there is found in the history of the

Borstal System what would be described in Continental phraseology as at once an administrative, a judicial, and a legislative actualization of measures of social defence, as distinct from mere punishment. What makes it by far the most important system of the kind is the fact that the Borstal aims at removing, so to speak, the very breeding-ground of crime by taking the offender in hand just at the age when habitual criminals are made. In the words of the Committee of Inquiry of 1894: 'The age when the majority of habitual criminals is made lies between 16 and 21. It appears to us that the most determined effort should be made to lay hold of these incipient criminals and to prevent them by strong restraint and rational treatment from recruiting the habitual class. We are of opinion that the experiment of establishing a Penal Reformatory under Government management should be tried, and the courts should have power to commit to these establishments offenders under the age of 23, for periods of not less than one year and up to three years, with a free exercise of a system of licence.' The Prevention of Crime Act, 1908, and the Criminal Justice Administration Act, 1914, thus represent the legislative realization of the system of measures of safety foreshadowed by the Committee.

Apart from the Borstal, Feltham, and Aylesbury Institutions, the ordinary prisons, too, have at the present day adopted a modified Borstal system for adolescent offenders, irrespective of the length of their sentence or the gravity of their offence. This system, by introducing grades and merit marks and diverse other methods, bids fair to prove a valuable auxiliary to the Borstal System proper in the prevention of crime and in the rehabilitation of young offenders. It is another proof of the fact that the Borstal idea is greater than the Borstal Institution—it is a Measure of Social Defence, and distinct from the old-fashioned idea of Punishment.

3. CONDITIONAL CONVICTION: CONDITIONAL SENTENCE: CONDITIONAL DISCHARGE

Another type of measure of safety is provided by that branch of law which covers conditional conviction, conditional sentence, and conditional discharge.[1] The most important characteristic of this law is the amount of discretion it vests in the judge to mitigate the punishment, to suspend it, or to do away with it altogether, as he thinks right, in the circumstances of each case. As far back as 1879 the Summary Jurisdiction Act (42 & 43 Vic., c. 49) provided that where a court of summary jurisdiction had authority to impose imprisonment, or to impose a fine, for an offence punishable on summary conviction, that court might in the case of imprisonment impose the same without hard labour, and reduce the prescribed period thereof, or do either; and in the case of a fine, if it was imposed in respect of a first offence, might reduce the prescribed amount thereof (sec. 1.) Section 16 of the Act went much farther. It provided that if, upon the hearing of a charge for an offence punishable on summary conviction, the court was of opinion that, though the charge was proved, the offence was of so trifling a nature that it was inexpedient to inflict any punishment, or any other than a nominal punishment, the court without proceeding to conviction might dismiss the information and, if the court thought fit, might order the person charged to pay such damages not exceeding 40 shillings and such costs of the proceedings, or either of them, as the court thought reasonable; or the court upon convicting the person charged might discharge him con-

[1] The expression 'conditional discharge or release', as used in this context, should not be confused with another use of it which refers to the status of an offender who, *while already serving his period of sentence*, is given conditional liberation and is let out on parole. The latter is dealt with in a subsequent section of this chapter.

ditionally[1] on his giving security to appear for sentence when called upon, or to be of good behaviour, and either without payment of damages or subject to the payment of damages as the court thought reasonable.

The Probation of First Offenders' Act, 1887 (50 & 51 Vic., c. 25), represented a further advance in judicial individualization. It was an Act to provide for conditional release of first offenders, and laid down that, in any case in which a person was convicted of larceny, or false pretences, or any other offence punishable with not more than two years' imprisonment, before any court, and no previous conviction was proved against him, if it appeared to the court before whom he was so convicted that, regard being had to the youth, character, and antecedents of the offender, to the trivial nature of the offence and to any extenuating circumstances under which the offence was committed, it would be expedient for the offender to be released on probation of good conduct, the court might, instead of sentencing him at once to any punishment, direct his release on his entering into a recognizance to appear and receive judgement when called upon, and in

[1] This is on the same lines as the law of 1891 known in France as the Bérenger law, or the law of *sursis à l'exécution de la peine*. The Paris International Congress of 1895 also came to the conclusion that 'those penal systems which recognize the discretion of the courts to suspend execution of sentence in the case of first offenders committed for short terms give expression to a most admirable tendency'. See Ruggles-Brise, *Prison Reform at Home and Abroad*, pp. 59, 60–64, where the subject is treated with reference to its bearing on short sentences and its relation to the system of probation. Saleilles, however, is of opinion that *sursis* as understood by Bérenger is not necessarily confined to cases calling for short sentence: 'The judges were given the means of saving those who appeared before them for the first time. They of necessity had to test the motives and sentiments of the defendants, it was for them to appraise and judge, and the law prescribed no further or partial instruction. The law of 1891 did not even make a distinction in terms of the gravity of the offence. It considered all cases of corrective imprisonment irrespective of duration, even cases involving the maximum legal period of five years and cases assigned a corrective punishment by reason of provocation, or of mitigating circumstances in the charge'. Saleilles, *The Individualization of Punishment*, pp. 215–17.

the meantime to keep the peace and be of good behaviour (sec. 1).[1]

It is noteworthy that the considerations which were to weigh with the court were not only the youth, character, and antecedents of the offender, but the objective gravity of the offence itself, so that the fact that the offence was not of a trifling nature, but one of the graver ones, might weigh with the court to disqualify the person charged from enjoying the benefits of the Act, although a consideration of the personality of the offender might have disclosed that he was not of a criminal temperament and was deserving of treatment different from that of punishment. Here the trace of the objective school was still visible. The earlier and the orthodox system had been that of definite penalties, giving the court no option whatever but to inflict the punishment prescribed. The first step was taken when the legislature became content to fix merely the limits of duration of the penalties, as in most codes of the present day, the court being authorized to fix definite penalties within the prescribed limits. This gave an opportunity to the court to individualize the punishment, and thus in a large measure did away with the extremely mechanical character of the old system. The next step was to give the court the power of granting conditional sentence after conviction as in the Act under consideration. These gradual changes no doubt testify to the acceptance of the principle that punishment is not all in all, but the sovereign remedy is in measures of protection—of society, as well as of the individual offender—and to that extent they represent an advance. But the method of application of the remedy is seen in this Act to be still defective inasmuch as the court has no opportunity to get into touch with the personality of the offender—which is a necessary condition for satisfactory individualiza-

[1] Cf. The Code of Criminal Procedure in India Act V of 1898, sec. 562.

tion. The knowledge of the judge has, under the existing administration of justice, to be confined to the facts and circumstances elicited in course of the trial, and it is well known that only those facts are deemed relevant which are incidental to the guilt of the accused. In the ordinary course of things no one would be entitled to draw the attention of the court to facts concerning the personality of the offender. Therefore, the data that are most essential for proper fixing of the limits according to the needs of the offender are wanting.

Next came the Probation of Offenders Act of 1907, which repealed section 16 of the Summary Jurisdiction Act of 1879 and the Probation of First Offenders Act of 1887, and gave wider powers of individualization to the judge in respect of granting release to the offender charged with an offence triable by the Court of Summary Jurisdiction. It provided that, if the court was of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it would be inexpedient to inflict any punishment or any other than a nominal punishment, or that it would be inexpedient to release the offender on probation, *the court would be competent to dismiss the charge altogether even if the charge was proved* and, if the court so thought fit, might bind the offender over, with or without sureties, to appear for conviction and sentence when called upon at any time within a specified period not exceeding three years. It also gave power to the court, in the event of such dismissal of the charge as above mentioned, to order the offender to pay damages for injury, or compensation for loss, and to pay such costs of the proceedings as the court thought reasonable.

4. PROBATION

One of the fruits of the system of suspended sentences is Probation, which may well be regarded as America's contribution towards the growing scheme of measures of safety.

The court had power under the common law to suspend a sentence, and this power used often to be exercised by letting off the prisoner on promise of good behaviour, backed up by a financial guarantee, or surety to the satisfaction of the court, that if the offender did not maintain good behaviour he would be available for serving out his sentence. This was found to have a wholesome effect on the mind of the offender. To consolidate this good effect it was found useful to let the offender have the assistance of some kind-hearted preson who would act as a guide and a friend to him during this critical period. At first this friendly service used to be rendered by benevolent-minded volunteers, who thus became the prototypes of the so-called probation officers who came into existence when probation was afterwards authorized by statute.[1] 'From

[1] Sutherland records one notable case of such volunteer effort thus: 'Among the early volunteers was John Augustus, a shoemaker of Boston, who in 1849 secured the release of a confirmed drunkard from the police Court of Boston by acting as surety for him. This offender turned out to be a sober, industrious citizen under his care. Then Augustus extended his efforts to others. During the course of seven years he acted as surety for 253 males and 149 females in an amount that totalled $15,320, and it is reported that not one of his charges violated the conditions of his release.' Sutherland, *Criminology*, p. 50. Robinson refers to another instance: 'About the year 1872, a large-hearted man, Father Cook by name, began his work of ministry in the criminal courts of Boston. He succeeded in gaining the goodwill of the judges and, where it seemed that the offender stood in more need of a wise and sympathetic friend than a sentence, the case would be continued and the offender turned over to Father Cook. Two years after Father Cook's work had been given legal sanction in Suffolk County, the system was extended to the entire State. City aldermen and select men of towns were authorized to establish the office of probation officer. The law was merely permissive, however, and not much was done under it to extend the work'. Robinson, *Penology in the United States*, p. 195. See also 'The Probation System', by Charlton T. Lewis, in the *Proceedings of the National Conference of Charities and Correction* (1897), pp. 36–46.

a social point of view', say the authors of *Juvenile Courts and Probation*,[1] 'it (probation) may be said to be a process of educational guidance through friendly supervision. Mere surveillance is not probation. Probation is an intimate, personal relation which deals with all factors of a child's life, particularly his home. This conception of probation as a vital, active force naturally carries with it the requirement that those who exercise the function—the probation officers—should be trained, sympathetic, experienced men and women.'[2]

The earliest statute is a statute of Massachusetts in 1878, authorizing the Mayor of Boston to appoint a probation officer for Suffolk County. But this was merely permissive. In 1891 the law made it compulsory for the entire State. The year 1899 marked the adoption of the principle of probation, mostly by permissive statutes, in some other States. Then there was a steady progress till in 1921 we find that thirty-five States and the District of Columbia had adopted adult probation, but forty-seven States *plus* Alaska, Porto Rico, Hawaii and the District of Columbia had probation for juveniles.[3]

Thus, beginning with the juveniles, the system of probation has now established its undoubted efficacy with all delinquents, and its future lies in its progressively extensive and intensive application to adults as well as to juveniles.

In England the Probation of Offenders Act, 1907,[4]

[1] Flexner and Baldwin (New York, The Century Co., 1916), p. 79 et seq.

[2] As Mr. Leeson pregnantly puts it, 'The essence of probation is constructive friendship': *The Probation System* (London: P. S. King & Son, 1914), p. 114. So also Robinson, 'If probation is anything more than a mitigation of the severities of the law, it is no exaggeration to speak of the probation officer as the most important part of the probation system. He himself is the reformatory, the walls, the discipline, and the good influences, all combined in his own person, and he must, therefore, be the great positive vitalizing force in the life of the offender placed on probation.' *Penology in the United States*, pp. 206–7.

[3] Cf. Robinson, *Penology in the United States*, p. 196. [4] See *supra*, p. 104.

was the first legislative expression of its public approbation. It was further extended by the Criminal Justice Administration Act, 1914, which provided *inter alia* that a recognizance under the Act might contain such additional conditions with respect to residence, abstention from intoxicating liquor, and any other matter as the court might consider necessary. This authorized the court to place the offender within the reach of probation in voluntary homes or otherwise. Under section 25 of the Children Act (1908)[1] the Secretary of State was empowered to cause all voluntary homes to be inspected and to appoint officers to make such inspection, thereby bringing all such voluntary homes within the purview of state tutelage. The year 1925 was signalized by two important events in the history of probation. The International Prison Congress, held in London in that year, at which almost every country in the world was represented, unanimously passed a resolution recommending the use and extension of Probation. The Criminal Justice Act[2] was passed by the English Parliament in the same year and the first portion of it was concerned wholly with the extension and co-ordination of the probation system in England. The practical scheme of the Act with respect to probation is so well visualized in the Home Office Report[3] that no apology is needed for the following extract from it:

'(*a*) The country will be divided into probation areas. Each Petty Sessional Division will form a separate probation area, but, for the convenience of administration, power is given to the Secretary of State to combine two or more Divisions so as to form a single probation area. As in many cases the most effective plan may be to combine for probation purposes all the Divisions of a county or

[1] 8 Edw. VII, c. 67. [2] 15 & 16 Geo. V, c. 86.

[3] Children's Branch, 1925, p. 15, quoted in W. Clarke Hall, *Children's Courts*, pp. 147–8.

part of a county, an initiative is given to Courts of Quarter Sessions to prepare such schemes of combination and submit them to the Secretary of State for consideration.

'(*b*) One or more probation officers must be appointed for each probation area. This should tend to encourage the use of probation especially in those Divisions where there is no probation officer at present. It does not necessarily mean that where there are only a few cases in the year suitable for probation a Court must appoint a full-time probation officer. Sometimes it may be possible to employ a qualified man or woman who is engaged in other social work and willing to give a part of his or her time to probation work, but probably the better plan will be for such Courts to be associated with neighbouring Courts under the system mentioned above so that they can share the services of the same officer. Probation work is admittedly difficult, calling for both training and experience, so that the best results are likely to be obtained by those officers who devote their whole time to the work.

'(*c*) As great importance is attached to the local administration of probation work, the Justices, by means of Probation Committees, will be responsible for appointing the officers, paying their salaries and supervising their work, subject to rules made by the Secretary of State. In a probation area which consists of a single Petty Sessional Division, all these duties will be exercised by the Probation Committee for the area, except that the probation officers will be appointed by the Justices acting for the Division, unless by resolution they delegate the duty to the Committee.

'In a combined area the duty of appointment and payment will rest with the Probation Committee for the combined area, and the duty of supervising the work will rest with the Probation Committee of the several Petty Sessional Divisions comprised in the area.

'(*d*) The selection of probation officers will be left to the Justices or Probation Committees subject to any regulations made by the Secretary of State. The Bill makes it clear that the agents of voluntary societies may continue to be appointed for the purpose. Missionary and probation work in Police Courts was initiated by voluntary societies, and in many cases the best interests of the work may be secured by a continuance of the policy of using their resources, so long as the Justices are satisfied that the society concerned is properly organized and that the men and women proposed for appointment are well qualified.'

Notwithstanding all the appreciation and encouragement which probation has received, its spread in England has not been commensurate with its importance. Mr. Clarke Hall thus brings out the contrast between England and the United States in respect of probation: 'When it is realized that in one single Juvenile Court in America nearly as many children are placed on probation in a year as in all the Juvenile Courts in England and Wales put together, it will be seen how small has been the development of the probation system in England compared with that in the United States. The exact figures are 3,343 children placed on probation in the New York 1st Division Children's Court, with a population of under 3,000,000. This is as against only 5,812 children in England and Wales, with a population of over 37,000,000. These figures would seem to show that we are in England still largely neglecting a very economical and, I believe, a very efficient means of dealing with Juvenile delinquents.

'The enormous difference in the English and American figures is, of course, partly accounted for by the fact that in America children not under proper guardianship and in moral danger are placed under probation officers, while this practice does not exist in England. Eliminating, however, all these cases, we get 1,657 children placed on

probation by the New York Court charged with the offences of larceny, assault, being beyond control, and disorderly conduct, against only 619 in London charged with similar offences. This, in proportion to the population, is just four times as many in the former as in the latter, and about six times as many if the figures for the whole of England and Wales are taken similarly.'[1]

The future of probation is bound up with four factors: first, its extension, or judicious adaptation, to adults; secondly, the training of a specially selected class of men and women with aptitude for the work and with a true sense of its responsibilities; thirdly, a well organized system of co-operation between salaried officers and voluntary officers and voluntary societies; and, lastly, restriction of the sphere of each officer's work to a requisite number of delinquents, so as to admit of individual and intensive treatment of each delinquent placed in his charge.

But whatever may be the lines on which it may advance in future, it is well established that the principle underlying probation will continue to be one of the potent factors in social defence.

[1] *Children's Courts*, pp. 125–6. The work in Canada appears to be on a large and organized basis. The Report of the Toronto Juvenile Court furnishes a sample. A staff of officials, far more complete than most Children's Courts in England have at their disposal, accomplished in Toronto during 1928 the task of dealing with some 2,538 juvenile offenders and 223 neglected waifs; it consisted, in addition to the Judge, of a psychiatrist, a consultant, a woman social investigator, a chief probation officer with four assistants (one of them a woman) besides five clerical officers. As regards the sentences passed, by far the largest number of cases (2,027) were adjourned *sine die* and no conviction at all was registered against them. This method, as Judge Mott observes, makes the statistics of recidivism less reliable, but 'the child's good name is of more importance'. Of the remainder some have their sentences suspended, and are placed on probation, and in the care of a Big Brother or Big Sister, and some, upon their undertaking to behave themselves, leave the Court to work out their own salvation; others are left under the temporary or permanent supervision of Children's Aid Societies. A few are sent to an Industrial School as a last resort.

5. INDETERMINATE SENTENCE

A most valuable aid to probation is found in the principle of Indeterminate Sentence.

The psychological principle underlying indeterminate sentence is hardly open to question. The reason why penologists appear to be still divided in opinion on this important subject is that the system, as practised in the United States, has lent itself to diversities of form whose efficacy and utility it is difficult to measure on account of the absence of reliable figures. Moreover, the forms in which it has manifested itself in some of the States are open to reasonable objection. Apart from the differences of opinion on these details, there is widespread conviction, which is gradually strengthening, that, as a means of reformation of the offender and, consequently, as a superior measure of social defence, a cautious and discriminating application of the principle of indeterminate sentence offers infinite advantages.[1]

There are two aspects from which indeterminate sentence may be viewed—what may be called its negative and affirmative aspects. In its negative aspect it is seen merely as a sentence, the period of which is undetermined and which may thus admit of indefinite prolongation. In this respect its genesis may be traced to the days of the Inquisition when a man might be ordered to be imprisoned for such time as seemed expedient to the Church. It has also an analogue at the present day in the case of the criminal lunatic who is detained 'during His Majesty's pleasure'. These methods involve merely the period of

[1] This is demonstrated by the fact that, whereas at the International Prison Congress of 1900 at Brussels it met with a hostile reception, at the Washington Congress in 1910 it received definite recognition, and a resolution was unanimously passed 'affirming the value of the principle for reformatory purposes and restricting its application to moral and mental defectives'. Ruggles-Brise, *Prison Reform at Home and Abroad*, p. 162; see also Ruggles-Brise, *The English Prison System*, p. 55.

detention being indeterminate, and therefore being capable of indefinite prolongation. On the other hand, there is a positive aspect from which indeterminate sentence is justly regarded as an advanced and scientific method of social protection. This positive aspect consists in making reformation the key to release and in placing the key in the hands of the offender; in other words, in letting the offender himself determine the period of the sentence by availing himself of the opportunities for correction placed before him. The sooner he gives evidence of correction, the earlier does he earn his release. The view that definite sentences are unscientific rests on the recognition of the well-known fact that no judge at the time of passing the sentence can possibly be expected to be fully cognizant of the antecedents of the offender, his heredity, his physical and mental history, his aptitudes and idiosyncracies, or his susceptibility to correction. Still less can he have any knowledge as to what effect the sentence will have on the prisoner, and at what moment he will be fit for release with due regard to the safety of society. Facts and circumstances such as those above mentioned, which are to form the data upon which his release is to be decided, can only be brought to light in course of time *after the sentence*, and then only provided there be the proper machinery for investigation and for kind and careful observation of the prisoner during the period of his sentence. The punishment must thus be adjusted not to the gravity of the offence but to the personality of the offender and to the possibilities of reforming him. Hence the necessity for introducing a system ensuring elasticity as to the period of sentence, and also as to the rigour with which it is to be executed, so that an offender may not be detained after he has reached a state of fitness for release, nor let loose upon society unless and until he reaches that state.

Looked at from the above positive point of view,

indeterminate sentence has been regarded as the descendant of the Mark System adopted by Captain Alexander Maconochie in Norfolk Island in the days when the system of transportation obtained, and of the later so-called 'Progressive System' or 'Irish Intermediate System' associated with the name of Sir Walter Crofton. In certain respects it has an affinity also with the so-called 'Good Time Laws', which prevailed in various parts of the United States from the first quarter of the nineteenth century onwards before the fame of the Irish System travelled to America.[1] It follows that in some of its details there is also an affinity with the system of conditional liberation practised in England along with the preventive detention which has already been discussed. In all these, however, despite the superficial resemblance, there is a fundamental point of difference, namely, they are all cases of fixed sentences, the period of which may be shortened by the operation of certain administrative rules, somewhat mechanical in their application. The faults of the ticket-of-leave system have been well summed up by Sir Evelyn Ruggles-Brise: 'The ticket-of-leave system affords no solution of the problem of fixed sentences, and in no sense is a substitution of a labour for a time sentence. All it does is to tell a man that if he does not forfeit marks his sentence will be, say, three years nine months instead of the five to which he was sentenced. It remains a fixed sentence, and in practice *the* sentence, for the great majority of convicts earn full marks by a more or less mechanical process. Abstention from acts contrary to discipline and from overt

[1] 'The general principle of the Good Time Laws was that the prison board was authorized to release the prisoner in less time than the sentence imposed by the Court if, in their opinion, the prisoner maintained good conduct in prison. The prison board was the administrative authority and could determine whether the prisoner had earned the reduction in sentence or had not, but the legislature made the schedule of reductions in time.' Dr. Edwin H. Sutherland, *Criminology*, p. 509.

idleness will secure him full remission. Again, it is almost impossible to make the 'mark system' a true index of labour. It is a task almost beyond human competence to assess marks according to labour. No one is to blame for the fact that from the necessities of the case a mark system is almost bound to degenerate into a formality, a good and useful formality, and of great influence in convict prisons to-day, but its virtue is negative, not positive. A man only has to keep out of trouble to earn a full remission. It is giving the old mark system a very high place in the category of those things that serve to solve the prison problem to say that it is in effect the substitution of a 'labour' for a 'time' sentence'.[1]

Distinct from the negative value of the mark system, or the ticket-of-leave system, the positive value of the system of indeterminate sentence consists in concentrating on the personality of the offender and enabling him gradually to develop the best that is in him by encouragement and kindness combined with hard discipline and instruction. The system of marking may be only one among the many instruments employed in the general programme of that training. The greatest of all the instruments in so rehabilitating the offender is found in the indefiniteness of the period of the sentence and in the power given to the offender to determine it by satisfying the administrative authorities as to his fitness for release. Thus it is not on the fear implanted by the old prison régime but on what is substituted for it, namely, hope, which the system of indefinite sentence is calculated to awaken in the offender, that its strongest claim to universal consideration is based.

It is not within the scope of this work to enter into the history of the system, nor the details of its working. They have been so fully dealt with in many works of authority[2]

[1] *Prison Reform at Home and Abroad*, p. 30.

[2] The reader is referred to *Fifty Years of Prison Service* (Charities Publication

that it will be sufficient to have outlined its salient features, which are likely to weigh with those who may seek to adopt it as a measure of safety. But in order that the programme of work may be visualized I give below an extract from the *Handbook of the New York State Reformatory at Elmira*.

The prerequisites and facilities for such reformation are:

'(*a*) Indeterminate sentence committal of prisoners, with its conditional release clause, substantially as at Elmira, but without the maximum limitation feature of the reformatory law.

'(*b*) A marking system and accounting with each prisoner, which should include wage-earning necessity, with sale and other expenditure opportunity.

'(*c*) Trades school so comprehensive and complete that each prisoner pupil shall learn and practise the occupation best for him to follow on his release.

'(*d*) School of letters, covering instruction from the kindergarten grade to and including the academic, together with a supplemental lecture course.

'(*e*) Military organization, training and drill, embracing every inmate not disqualified.

'(*f*) Physical culture and well-appointed gymnasium with bath and massage appliances for scientific use to renovate the physical man, compensate asymmetries and augment vital energies.

Committee, New York 1912), by Zebulon R. Brockway, pp. 161–386; *Punishment and Reformation*, by Dr. Frederick Howard Wines, chap. ix, pp. 190–8, and chap. x, pp. 199–234; *Prison Reform at Home and Abroad*, by Sir Evelyn Ruggles-Brise, pp. 29–32, pp. 89–99, and pp. 159–65; *Criminology*, by Edwin H. Sutherland, pp. 510–22; *Penology in the United States*, by Dr. Louis N. Robinson, chap. viii, pp. 130–52, pp. 220–6; 'Le Système des sentences indéterminées' in *Revue de Droit pénal et de Criminologie*, of November 1926; Address to the Ninth International Penitentiary Congress of 1925 by Lord Cave, in its 'Proceedings', pp. 259–67; *Handbook of the New York State Reformatory at Elmira* (1906).

'(*g*) Manual training proper, with tool work, etc., for use to aid recovery from discovered specific physical defects.

'(*h*) For more direct appeal to the moral and spiritual consciousness, there should be provided a library of carefully selected and wisely distributed books, with class study of literature and authors; art education by use of the stereopticon, with lectures, and, when practicable, occasional art exhibitions carefully selected and explained; music, both vocal and instrumental, always high class, given and practised to quicken sensibilities and for refinement; oratory directed to inspire heroism and patriotism; these together with religious services and ministrations.

'The principles of good reformatory administration should include:

'(*a*) Custody so secure that prisoners do not occupy their minds with thoughts or plans for escape.

'(*b*) Control and management (within the law) by the constituted institutional authority without interference of 'influence' of outside persons. When the State undertakes the reclamation of criminals, benevolent societies and individuals rendering voluntary assistance should serve under advice: the state is competent and responsible.

'(*c*) There must be a resident executive officer in full command, vested with good authority and wide discretionary power.

'(*d*) Subordinate officers and employees should be appointed and dismissed by such executive at his pleasure. They should be completely and exclusively under his control, and their functions should be limited to his direction.

'(*e*) The entire life of the prisoner should be directed, not left to the prisoner himself; all his waking hours and activities, bodily and mental habits, also, to the utmost possible extent, his emotional exercises. So thorough and rigorous should this be that unconscious cerebration,

waking or sleeping, will go on under momentum of mental habits. There should be no time nor opportunity for the prisoner to revert to vicious characteristics'.[1]

As the name 'Borstal' now stands for the system adopted in England for the reformation of juvenile-adults (i.e. from the age of 18 to 21, the Home Secretary being empowered to extend it up to 23), so the name 'Elmira' now stands for the system of indeterminate sentence, with all its attendant reformatory machinery. It first began in New York and has since furnished the model for other States to follow, the object being to rehabilitate offenders of maturer years (the upper limit of age ranging from 25 to 35 in different States). The Elmira Reformatory in New York was established in the year 1869, but it was not till 1876 that the Reformatory was in a position to receive inmates. It made indeterminate sentences an essential part of its programme.[2]

[1] *Handbook of the New York State Reformatory at Elmira* (1906), pp. 119–21.

[2] Prior to this, the law of Indeterminate Sentence was first passed in Michigan (1869) and was known as the Three Years Law applicable to prostitutes, but it was soon declared unconstitutional. 'The creation', says Dr. Frederick H. Wines, 'of the New York State Reformatory at Elmira, in 1869, afforded them the opportunity which they coveted, and it was there that the new prison system (apparently the coming system of modern civilization) was virtually created.' As regards the persons whose names must for ever remain associated with it, the same author says: 'The change which has taken place is largely due to the exertions and influence of the Rev. Dr. E. C. Wines, the able and devoted Secretary of the New York Prison Association, by whom the National Prison Association was organized at a Congress held in Cincinnati, in 1870, from which the era of recent prison reform in America may be fairly dated. Associated with Dr. Wines was a noble group of men and women, among whom it might be regarded as invidious to name individuals, with one or two exceptions, notably Dr. Theodore Dwight of New York, Mr. F. B. Sanborn of Boston, and Mr. Z. R. Brockway, then of Detroit, but later of Elmira.' *Punishment and Reformation*, pp. 199–200.

The Cincinnati Congress was conspicuous by reason of its famous forty-one resolutions, all of which breathed of a new spirit in penology. The ninth resolution ran thus: 'That the time-limit of sentences must give way to the indeterminate principle, when discretion can be placed in the hands of a capable and devoted prison authority as to fitness for release.'

In 1877 at the instance of Mr. Brockway, who had been appointed Superintendent of the newly created Reformatory, was passed the New York Act legalizing Indeterminate Sentence. Section 2 of the Act ran thus: 'Every sentence to the reformatory of a person hereafter convicted of a felony or other crime shall be a general sentence to imprisonment in the New York State Reformatory at Elmira, and the Courts of this State imposing such sentence shall not fix or limit the duration thereof. The term of such imprisonment of any person so convicted and sentenced shall be determined by the managers of the reformatory, as authorized by this Act, but such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced.' The Act further provides that 'when it appears to the said managers that there is a strong or reasonable probability that any prisoner will live and remain at liberty without violating the law, and that *his release is not incompatible with the welfare of society*, they shall issue to such prisoners an absolute release from imprisonment and shall certify the fact of such release and the grounds thereof to the Governor, and the Governor may thereupon, in his discretion, restore such person to citizenship.' Between the sentence to the reformatory and the absolute release provided for in the manner above, intervene a multitude of rules for the system of marking according to good conduct and conditional release on parole.

Thus the law does not fix the duration of the sentence at all, but leaves it to the discretion of the Board of Management to release a prisoner whenever it may think the prisoner fit for release, with the proviso that the maximum period of sentence fixed by law for the offence in question must not be exceeded. This has been regarded in certain quarters—and perhaps rightly regarded—as fraught with danger, as it confers too great a power on the execu-

tive or administrative authorities. The case of Elmira may almost be regarded as an exception. It may be conceded that the difficulties there have been greatly clarified by the personality of Mr. Brockway, the founder, whose sagacity and devotion to the cause has enabled the system to admit of sensitive and delicate handling. At Elmira persons may be detained for the maximum period prescribed by the Code for the offence, but no minimum is fixed, so that, in theory, the authorities of the Reformatory may at their discretion release a prisoner at any time they think fit. In practice, however, there is a minimum observed, during which a prisoner must show progress and reformation, one of the auxiliaries to this method of reformation being the system of marking. Should a prisoner be found fit for modified liberty he would be released on parole and placed under the supervision of the Board of Parole. 'The great underlying thought in that institution', says Dr. Wines, 'is that criminals can be reformed; that reformation is the right of the convict and the duty of the State; that every prisoner must be individualized and given the special treatment adapted to develop him in the point in which he is weak—physical, intellectual, or moral culture, in combination, but in varying proportions, according to the diagnosis of each case; that time must be given for the reformatory process to take effect before allowing him to be sent away uncured; that his cure is always facilitated by his co-operation, and often impossible without it; that no other form of rewards and punishments is so effective, in so many instances, as transfer from one class to another, with different privileges in each; but that the supreme agency for gaining the desired co-operation on his part is power lodged in the administration of the prison to lengthen or shorten the duration of his term of incarceration. The other great thought, here insisted upon as nowhere else in the world, is that the whole process of reformation

is educational; not meaning by that term the injection of information without assimilation, but the drawing out to its full natural and normal limit of every faculty of the body, mind, and soul of every man who passes through the institution. This is accomplished by all sorts of athletic training; shop work, military drill, gymnastics, Turkish and other baths, massage and diet; by all sorts of intellectual discipline as well, including not merely class instruction and the hearing of lectures on subjects in which prisoners most need instruction, but also systematic reading under direction, and examination upon the books read; writing for the *Summary*, the prison weekly which circulates instead of the ordinary daily newspaper within the walls; and debate, in the presence of a teacher who guides and moderates the discussion. Trade instruction is made prominent. The aim of the institution is to send no man out who is not prepared to do something well enough to be independent of the temptation to fraud or theft.'[1]

Another type of indeterminate sentence provides for a certain minimum for all offences and a maximum varying with each offence as fixed by statute. Though in some of the States no legal minimum is fixed, the usual method is for the legislature to fix both the minimum and the maximum limits. The lower limit thus set has been regarded by some to be for the purpose of satisfying 'the notion of penalty and to guarantee at least a minimum period of punishment—a period in some general relation to the fixed-term sentence.'[2]

But considering that the idea of punishment is foreign to the system under discussion, perhaps it would be more correct to say that the purpose in fixing a minimum was to avoid too early a release by the administrative authorities

[1] *Punishment and Reformation*, pp. 230–1.

[2] Saleilles, *The Individualization of Punishment*, *p.* 304.

and to provide a sufficient time for reformation, rather than to satisfy the notion of penalty. In fact it has a history: the judges often misconceived the reformatory purpose of the system and defeated the intention of the legislature by making the minimum almost the same as the maximum. Hence it was found necessary for the legislature to provide that the minimum must bear some reasonable specified relation to the maximum.[1] The third type dispenses with the minimum and also with the special maximum for each offence. There is only a general maximum laid down for all offences. Thus, in theory, an offender may be released the day after the sentence is passed, but the actual procedure followed is that the Parole Board makes a recommendation to the convicting judge and has to obtain his sanction in writing before releasing the offender.

It is in this co-operation between the judicial and the administrative that the possibilities of perfecting the system lie. In various States co-operation is visible in the constitution of the Parole Board, which often consists of some members of the prison administration, some publicists (journalists and the like), and some men versed in

[1] The following indeterminate sentences in their relation to the respective maxima, taken from reports of recent years, will show how the difference between the maxima and the minima almost reached the vanishing point:— Sentence: two years and nine months; maximum: two years and ten months. Sentence: nineteen years and six months; maximum: twenty years. Sentence: thirty years; maximum: thirty-one years. Sentence: thirty-eight years; maximum: forty years. Sentence: One hundred and fifty years; maximum: one hundred and sixty years. 'In order to avoid such ridiculous abuses the legislature in some States deprived the court of the power to fix limits narrower than those fixed by the laws, and in other States provided that the minimum sentences fixed by the Courts must be not more than one-half (or some other fraction specified) of the maximum. It is preferable to give the entire control to the administrative board, as has been done in some States, and have the Court merely impose the minimum and maximum penalties as provided by the law.' Sutherland, *Criminology*, p. 513. It is noteworthy, however, that Dr. Wines observes, 'In this country, at least, the growing tendency of the legislatures is to reduce the maxima and do away with the minima.' *Punishment and Reformation*, p. 218.

law and capable of appreciating evidence. Yet the existing arrangements are capable of indefinite improvement. Not until the judiciary and the informed public take an intelligent interest in the affairs and management of the prisons, or reformatories, can there be any reasonable hope of the system working to complete satisfaction. The higher the ideal of an institution, the greater are the dangers and pitfalls in its actual working. There can be no doubt that there are infinite possibilities in the system of Indeterminate Sentence provided it is worked under proper safeguards and with a clear vision of the main objective, namely, protecting the offender from himself and protecting the State by bringing about his eventual reformation. One of the greatest safeguards, it is submitted, is not to leave the work entirely in the hands of the prison administration but to invoke also the assistance of the judiciary. In what way the help of the judiciary may be available is a matter which will depend upon the conditions and circumstances of each country. But the truth is forcing itself more and more upon the minds of all interested in penology that the outlook of the judges must change towards offending humanity and that a more living and informed interest on their part in prison administration is absolutely essential to definite progress. At the present moment the attitude of the judge, with a few honourable exceptions, is one of complete indifference. 'I administer the law as I find it, and I have nothing further to do'—this may be said to represent the invariable attitude of the judiciary.[1] Reform can only be expected from the united action of the legislature, the judiciary, and the prison administration. The realization of measures of social defence calls

[1] Dr. Louis Robinson declaims against this indifference in a characteristic manner: 'A three months detention in the County jail ought to be required of every candidate for admittance to the Bar who expects to practise criminal law, and as for judges, the sentence ought to be at least a year!' *Penology in the United States*, p. 210.

for all three—perhaps more of the one and less of the other in particular cases. In the case of indeterminate sentence the legislature can only make a start; the proper carrying-out of it must depend on the co-operation of the judiciary and the prison administration.

The spread of the idea of indeterminate sentence in the American Union is one of the most remarkable testimonies to its value. In 1910 the principle was unanimously accepted by the International Penitentiary Congress at Washington as applicable to mental and moral defectives. In 1921 as many as thirty-seven States accepted and authorized it. It may be reasonably anticipated that the system, in varying forms according to local conditions and requirements, will be adopted in all countries and will thus afford greater scope to the salutary influences of defensive measures.

6. PAROLE: CONDITIONAL RELEASE: PREVENTIVE DETENTION

The system of Parole is an almost invariable concomitant of the system of indeterminate sentence as applied in the United States, and is a powerful factor in its success. There are two principles underlying it: first, in the interests of society it is very properly recognized that not even the best-informed person, or body of persons, can be infallible in deciding that a prisoner is fit for release. It is, therefore, expedient that the latter should not be released outright and unconditionally, but that a half-way house should be found for him between imprisonment and complete liberation, so as to enable the authorities to judge whether he is indeed sufficiently reformed to be finally restored to full rights of citizenship. Secondly, in the interests of the individual to be released it is felt that a tentative period spent in an atmosphere of considerably relaxed restraint is a help to him in developing his self-esteem, his sense of responsi-

bility, his freedom, and his initiative. Prison life is essentially a life of routine and discipline, and initiative is apt to find little scope for its exercise. It is thus deemed expedient that the prisoner, before he is again thrown upon the outside world, should be given an opportunity to develop, or, if he has not altogether lost it, to recover, that self-esteem and power of self-help which are essential to steer him through the struggles and temptations of life. This purpose is effected through the Parole Board and the staff of officers working under it generally known as Parole Officers. The Parole Officer fulfils the function not only of supervising the programme of work of the released prisoner but also of taking a personal interest in his welfare, helping him with advice and guidance, securing fair treatment from his employer and otherwise playing the part of a guide, philosopher, and friend. Should the prisoner be guilty of violation of the terms of parole he is liable to recommittal to prison.

Parole has, therefore, been defined as 'the act of releasing, or the status of being released, from a penal or reformatory institution in which one has served a part of his sentence, on condition of maintaining good behaviour and remaining in the custody and under the supervision of the institution or some other agency approved by the State until a final discharge is granted'.[1] It will be evident that, considered in the stricter sense of *mesures de sûreté*, as distinct from punishment, parole hardly satisfies the essential requirements. Unlike probation, which is a measure of safety employed during the period when the imposition or the execution of the sentence is suspended, parole presupposes the imposition of a sentence and the serving of it for a partial period. It, therefore, cannot and does not take the place of punishment. Yet from the broader standpoint of ultimate defence of society to be

[1] Sutherland, *Criminology*, p. 523.

attained through the rehabilitation of criminals, it must be conceded to be a measure of safety.

The main qualifications of the ideal Parole Officer are very nearly the same as those of the ideal Probation Officer for, in the ultimate analysis, what is wanted in either case is that the delinquent should be under the salutary influence of constructive friendship. The state of parole as much as the state of probation may suffer from excess of supervision or excess of relaxation. The whole problem is one of personality—dominant personality in the Probation or Parole Officer and its dynamic reaction on the dormant personality of the offender. In actual practice the technique of the parole system is distinctly inferior to that of probation. But that fact does not take away from the future of the parole system, which has just as many possibilities of development.

Though parole is often found employed in conjunction with the system of indeterminate sentence, it has no necessary connexion with it and may be equally efficacious when employed on prisoners under definite sentence. This fact accounts for its presence not only at Elmira Reformatory in association with the system of Indeterminate Sentence but also in a modified form at Camp Hill (England)—an institution meant for dealing with quite different material from that of Elmira, namely, habituals under preventive detention. The so-called system of Preventive Detention is based on the Prevention of Crime Act, 1908 (8 Edw. VII, c. 59), part ii, which provides that where a person is convicted on indictment of a felony, committed after the passing of the Act, and subsequently the offender admits that he is, or is found by the jury to be, an habitual criminal, and the court passes a sentence of penal servitude, the court, if of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for

a lengthened period of years, may pass a further sentence ordering that on the determination of the sentence of penal servitude he be detained for such period not exceeding ten, nor less than five, years as the court may determine (sec. 10, sub-sec. 1). As to what will go to make an offender an habitual criminal within the meaning of the statute, it is provided that a person shall not be found to be an habitual criminal unless the jury finds on evidence: (*a*) that since attaining the age of 16 years he has at least three times previously to the conviction of the felony charged been convicted of a felony, whether any such previous conviction was before or after the passing of the Act, and that he is leading persistently a dishonest or criminal life; or (*b*) that he has on such a previous conviction been found to be an habitual criminal and sentenced to preventive detention (sub-sec. 2). The sentence of preventive detention takes effect immediately on the determination of the sentence of penal servitude, whether the sentence is determined by effluxion of time or by order of the Secretary of State at such earlier date as the Secretary of State may direct (sec. 13, sub-sec. 1). Conditional release is provided for in section 14. That section lays down that the Secretary of State shall, once at least in every three years during which a person is detained in custody under a sentence of preventive detention, take into consideration the condition, history, and circumstances of that person with a view to determining whether he shall be placed on licence, and, if so, on what conditions (sub-sec. 1). The Secretary of State may at any time discharge on licence a person undergoing preventive detention if satisfied that there is a reasonable probability that he will abstain from crime and lead a useful and industrious life, or that he is no longer capable of engaging in crime, or that for any other reason it is desirable to release him from confinement in prison (sub-sec. 2). A person so discharged on licence may be dis-

charged on probation, and on condition that he be placed under the supervision or authority of any society or person named in the licence who may be willing to take charge of the case, or on such other conditions as may be specified in the licence (sub-sec. 3). The Directors of Convict Prisons are enjoined to report periodically to the Secretary of State on the conduct and industry of persons undergoing preventive detention, and on their prospects and probable behaviour on release, and for this purpose the Act provides that they shall be assisted by a committee at each prison in which such persons are detained, consisting of such members of the board of visitors and such other persons of either sex as the Secretary of State may from time to time appoint (sub-sec. 4). It is also provided that every such committee shall hold meetings at such intervals of not more than six months as may be prescribed, for the purpose of personally interviewing persons undergoing preventive detention in the prison and preparing reports embodying such information respecting them as may be necessary for the assistance of the Directors and may at any other time hold such other meetings and make such special report respecting particular cases, as they may think necessary (sub-sec. 5).

In actual working the provisions relating to conditional release appear to be complied with rather mechanically. In order to decide as to when an offender may be safely released from prison, the determining factors should be the circumstances of each particular case, including the offender's personal history prior and subsequent to the offence, his mental and physical condition at any given moment, in short, his whole make-up. A scientific study of personality is as essential for individualized treatment in prison as for ascertaining the duration of imprisonment and the exact moment for release. As has been observed 'the psychiatrist should play an important part in the

decision as to the eligibility for Parole. There should be before the paroling body a full psychological and psychiatric study of the individual. And on parole itself the inmate should not escape the proper attention of the scientific eye. The new conditions of environment react upon the inmate's mentality, and many a paroled inmate requires steadying and help of an order other than the securing of a job or the clasp of a friendly hand.'[1]

With scientific aids and safeguards such as those dealt with in the preceding paragraph, the powers which the Act confers under section 16 on the Secretary of State may be easier of exercise. The section provides that the Secretary of State may at any time discharge absolutely any person discharged conditionally on licence. But ordinarily the Secretary of State will scarcely feel inclined to take the responsibility upon his own head of releasing a prisoner before his time.

The application of proper scientific methods is likely to enhance the value of conditional release to a considerable extent.

7. MEASURES OF SAFETY FOR THE IRRESPONSIBLE: GRADES OF INFIRMITY AND SEMI-INFIRMITY

In the eye of orthodox law a delinquent must be either sane or insane. There is no gradation in mental infirmity. Legal insanity does not admit of degrees. Hence the course of law is clear-cut; namely, for the insane and irresponsible, detention in asylum 'during His Majesty's pleasure', and for the sane and responsible, punishment.

What is the test of criminal responsibility? A person is criminally responsible if, at the moment of committing the criminal act, he is capable of knowing or remembering that the act is wrong, contrary to duty, and such as in any well-ordered society would subject the offender to punish-

[1] *Annual Report for* 1918 *of the Prison Association of New York.*

ment. He need not have been aware of the fact that it was against the positive law of the land. Criminal responsibility is tested not with reference to knowledge of the law of the land but of the general principles of morality and right conduct. The rule in M'Naghten's Case[1] may thus be deduced out of the answers of Tindal C.J. delivered as the unanimous opinion of all the judges, except Mr. Justice Maule: Every man is supposed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved. To establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing, or omitting, an act, the party accused was labouring under such a defect of reason from disease of the mind as not to know the nature or quality of the particular act or omission, or as not to know that he was doing what was wrong.

In order to test mental infirmity, the rule in M'Naghten's Case clearly puts the whole stress on knowledge, intelligence, or reason. Even in the case of delusion this emphasis on intellectual sanity is evident. For the rule enunciated with reference to delusional insanity contemplates two different classes: a delusion proper, and a delusion attended with frenzy or mental storm. In the former case, the test laid down is that if the delusion were such that the person under its sway had a real and firm belief in some fact not true in itself but which, if true, would excuse his act, the delusion would constitute a justifiable excuse on the ground of insanity. For instance, where the belief on the part of a homicide was that the party killed was going to make an attempt on his life; or the belief was that he himself was the appointed scourge of God and the particular act was done by him under the immediate command of God which he dare not defy, his will having thus been overborne by a higher power superseding all human

[1] (1843) 10 Cl. & Fin. 200, H.L.; 8 E.R. 718.

laws and laws of nature, the plea of insanity must prevail. In the case of delusions attended by mental storm and frenzy it must be shown that the outbreak was of such a character that, for the time being, his memory and reason were overborne and that the influence of motives or the exercise of will became an impossibility.

It is clear that the view above enunciated is based on the freedom of the will, which acts under the guidance of motives. If the mind is clouded by a temporary or permanent delusion, whether attended by a mental storm or not, and if the power of judging whether the particular act is right or wrong is at the moment of the act in abeyance, the motive power itself (which emerges from such knowledge of right or wrong) is non-existent, and the act ceases to be voluntary. Hence the criterion of responsibility fails. And it is only in such cases as these that the plea of insanity can prevail. In other cases the offender must be held to be sane and therefore responsible.

This view fails to take into account the fact, proved by science, that there exists an intermediate zone between reason and madness which is filled by grades of semi-infirmity, and that the semi-infirm delinquents coming within these grades cannot be held to be either totally responsible, or totally irresponsible. It also fails to recognize that, apart from 'intellectual insanity', there may be 'moral insanity'; in other words, that there may be uncontrollable impulses of the mind, co-existing with full possession, or all but full possession, of the reasoning faculties, which may render a person quite incapable of resisting himself. Amongst these semi-infirms is to be found a whole legion of varieties—the mentally feeble-minded such as idiots, imbeciles, and morons; those suffering from dementia praecox, epilepsy, and constitutional psychic infirmity; those suffering from psychoneuroses, such as neurasthenics, hysterics, psychasthenics, kleptomaniacs,

pyromaniacs, and the so-called anxiety-neurotics; those suffering from mental conflicts; and, lastly, the intoxicated, i.e. the alcoholics, morphinomaniacs, cocainomaniacs, etc. Considering the multitude of varieties and the numerous gradations of which infirmity or semi-infirmity of mind or will admits, the conclusion becomes inevitable that the only way of discovering whether a person should be dealt with as a criminal or as a defective is to have recourse to scientific methods. Hence the value of the Binet-Simon Tests, the Terman Tests, and Dr. William Healy's Tests, to mention some that are already in use. In the scientific administration of measures of safety or punishments according to the requirements of each individual case, a resort to clinics and to the help of psychiatrists, alienists, and the like has for some time past been felt to be indispensable. The days of wholesale administration of punishment based only on the nature of the act committed are numbered. In the United States the number and quality of clinics, psychiatrists, and alienists is steadily on the rise. In England, too, this consciousness is continually increasing. In the Report of the English Prison Commissioners 1918–19 the following quotation appears, with their commendation, from a report of the General Purposes Committee presented to a meeting of the Justices of Birmingham dated 2 January 1919: 'The minds of many of the Justices of Birmingham have for a long time been exercised as to the futility and inadequacy of the customary methods of dealing with persons charged with crime, particularly as to the absence of any consideration of the mental conditions of such persons. It has been felt that in many cases some mental instability is the fundamental cause of the commission of crime and that treatment, as distinct from punishment (either by fine or imprisonment), is the proper and sane method to adopt. . . . A well-ordered State should clearly make provision for the

efficient treatment and, if possible, cure of those who by their acts of mental weakness are a menace to the community and thus jeopardize their right to freedom. . . . What is needed is the provision of facilities for the skilled treatment of mental disturbance (exhibited either by the commission of crime or other abnormal excess) in its early and curable stage.' It is not to be supposed, however, that the fact of complete or partial irresponsibility must lead to these semi-infirms being set at large. On the contrary, the mischief of which they may be guilty, or the further mischief of which they are capable, can only be combated by effective segregation and supervision, so as to throw them into a more restricted sphere where the stress and strain of existence may not be severe and adjustment to the environment may be rendered possible for the unfit and the ill-equipped.

The first important piece of legislation in the United Kingdom which followed the Royal Commission on the Feeble-minded, carried out the idea of segregation and supervision to a limited extent. The Mental Deficiency Act 1913 (3 & 4 Geo. V, ch. 28) adopts the following classification of persons who are mentally defective within the meaning of the Act: (*a*) Idiots; that is to say, persons so deeply defective in mind from birth or from an early age as to be unable to guard themselves against common physical dangers; (*b*) Imbeciles; that is to say, persons in whose case there exists, from birth or from an early age, mental defectiveness not amounting to idiocy, yet so pronounced that they are incapable of managing themselves or their affairs, or, in the case of children, of being taught to do so; (*c*) Feeble-minded persons; that is to say, persons in whose case there exists, from birth or from an early age, mental defectiveness not amounting to imbecility, yet so pronounced that they require care, supervision, and control for their own protection or for the protection of others, or in the case of children, that they, by reason of such

defectiveness, appear to be permanently incapable of receiving proper benefit from the instruction in ordinary schools; (*d*) Moral imbeciles; that is to say, persons who from an early age display some permanent mental defect coupled with vicious and criminal propensities on which punishment has had little or no deterrent effect (sec. 1). The Act provides not only for such persons as are already in the care of their parent or guardian, but also for those who are neglected, abandoned, or without visible means of support, or cruelly treated; for those who are found guilty of any criminal offence and ordered, or liable to be ordered, to be sent to a certified industrial school; for those undergoing imprisonment or penal servitude, or undergoing detention in a place of detention by order of a court, or in a reformatory or industrial school; or in an inebriate reformatory, or in an institution for lunatics or a criminal lunatic asylum; for those who are habitual drunkards within the meaning of the Inebriates Acts 1879 to 1900; and others (sec. 2). An order made under the Act sending a defective to an institution or placing him under guardianship ordinarily expires at the end of one year, unless continued as provided in the Act (sec. 11). A Board of Control, consisting of fifteen commissioners, of whom four are to be duly qualified practising barristers or solicitors, and four duly qualified medical practitioners and at least one to be a woman, is created under the Act and charged with the general superintendence of matters relating to the supervision, protection, and control of defectives (secs. 21, 22). State institutions are provided for the purpose of lodging defectives, as also certification of fitness of private institutions on their application, and on approval (secs. 35, 36). There are also in the Act provisions for contribution by local authorities and by the Treasury and for ensuring proper control and supervision of the institutions certified in the way mentioned above.

The adoption of the class 'Moral Imbeciles' has provoked criticism from some writers. One of them observes: 'Most writers come in the end to the statement that all moral imbeciles are primarily abnormal intellectually. And it would be well if the terms "moral insanity" and "moral imbecility" were both dropped, as tending only to confuse the issues.'[1] The objection is based on the fact, which is admitted, that the implication of the term 'moral' is merely to lay the emphasis on lack of self-control as distinguished from lack of intelligence. But lack of self-control, in the last analysis, is due to the inability to call up the proper memory pictures and to visualize the future so as to enable the individual to weigh advantages and disadvantages and in consequence to forgo immediate pleasure for the sake of a greater and more abiding advantage. All this involves memory, judgement, and reason—in other words, the intellect. Hence to speak of moral imbecility or insanity is only to confuse the issue. There is no moral incapacity that does not involve intellectual incapacity. But the criticism seems hardly justifiable. For while 'faculty psychology' must be avoided, there is no reason why, for the sake of accurate thinking, the predominance of intellectual, emotional, or volitional defect should not be expressed by terms appropriate for the purpose.

There is one aspect of the measures for the irresponsible which cannot be lightly passed over. It is the financial burden on the State which the requisite institutions and the specialized staff for them would necessarily involve. The treatment of many of these defectives may be long and laborious, and, in the case of some at least, the tutelage under the State must be lifelong. There is no escape from the fact that while complete or partial cure may be hoped

[1] M. Hamblin Smith, *The Psychology of the Criminal* (Methuen & Co., London, 1922), p. 155.

for in the case of many, there will always be a residuum of mental defectives who must be pronounced incurable. Unless it be the Tarpeian Rock, or some method of elimination such as was resorted to by the Spartans of old, one cannot think of anything else in these incurable cases than perpetual State tutelage to do duty for elimination. Even allowing for this unavoidable drain on public funds, the system of scientific treatment of mental defectives, it is submitted, is bound to prove economical in the long run. There is undoubted waste involved in the present mechanical system of definite punishments for definite offences and release of the offender at the end of the term prescribed, as a matter of course, without any regard to the change of mentality in the individual. Even the system of release on parole is fraught with danger to the security of society, and its frequent failure through disregard of scientific methods of treatment involves an untold expense. The economic drain resulting from ordinary imprisonment meets with characteristic criticism from the pen of Henry Ford. 'Once upon a time', he observes, 'society hung a man for stealing a loaf of bread. Now society treats such an offence differently. It takes that man, puts him in a prison, withdraws an amount of labour which might make thousands of loaves of bread, and then actually feeds him many times as much bread as he stole! We not only waste the man's productive power, but we also call on our other producers to give up a part of their production to support him. That is flagrant waste.'[1]

The importance of mental deficiency has impressed itself on criminologists for more than one reason. On the one hand, the classification of offenders according to their subjective character, rather than according to the objective offence they committed, has resulted in every criminologist making room in that classification for mental defectives,

[1] *To-day and Tomorrow* (Heinemann & Co., London, 1926), p. 89.

giving them a more or less conspicuous place. Beginning with Lombroso, whose whole theory of stigmata was one of anatomical defect betokening mental abnormality, whether in the shape of atavism or degeneracy, attention came to be more and more rivetted on the mentality of the offender, and the classification that resulted made room for the mentally unsound as a class not to be neglected. These diverse classifications[1] represent a growing conviction that mental defect is one of the prime factors in determining criminality. Without accepting Lombroso's theory, indeed in the very act of controverting the theory of the anthropological criminal type, Goring arrives at a reasoned scientific conclusion, based on innumerable observations and experiments, that the criminal is differentiated from the free average population by (*a*) defective physique, and (*b*) defective mental capacity. 'The crusade against crime', he says, 'may be conducted in three directions. The effort may be made to modify inherited tendency by appropriate educational measures; or else to modify the opportunity for crime by segregation and supervision of the unfit; or else—and this is attacking the evil at its very root—to regulate the production of those degrees of constitutional qualities (feeble-mindedness, inebriety, epilepsy, deficient social instinct) which conduce to the committing of crime.'[2]

[1] See Lombroso's classification in the *Criminal Man* and *Crime, Its Causes and Remedies*; Ferri's classification in *Criminal Sociology*, p. 24; Havelock Ellis, *The Criminal*, chap. i; Goring, *The English Convict*; Parmelee, *Criminology*, p. 197; Henderson, *An Introduction to the Study of the Dependent, Defective and Delinquent Classes*; Parson, *Responsibility for Crime*, chap. ii; Parson, *Crime and the Criminal*, chap. iv.

[2] In a foreword to *The English Convict* Sir Evelyn Ruggles-Brise observes, 'Putting aside the part played by different circumstances and without subscribing to the different views and doctrines which, in the opinion of the author, result from the inquiry, the broad and general truth which appears from the mass of figures and calculations is that the "criminal" man is to a large extent a defective man, either physically or mentally, or in the words of Sir B. Donkin is "unable to acquire the complex characters which are essential to the average man and so is prone to follow the line of least resistance".'

8. THE DEATH PENALTY

In primitive conditions of society where war was in truth the condition of existence, life was held cheap. Mere death being an ordinary phenomenon, torture was employed to add to the severity of the death penalty. The problem was how to make the extreme penalty of law severe enough. The number of capital offences was also as many as two hundred. A different idea prevails now. Since the days of Beccaria the tendency has been to reduce capital punishment to the limits of indispensable necessity. Moreover, far from endeavouring to make it more and more painful, the tendency is to make it as painless as possible. This change is due to two main causes: on the one hand, a growing belief in the sanctity of human life and, on the other, a diminishing faith in the efficacy of the death penalty as a deterrent. What has greatly undermined the faith in the efficacy of deterrents in general is the dawning sense of grades of mental disorder dealt with in the last section which, despite deterrents, lead the wrongdoer in spite of himself into the path of crime. It was Bacon who truly said about death, 'Revenge triumphs over it, love slighteth it, honour aspireth to it, grief fleeth to it and fear pre-occupieth it'. It was left to subsequent generations of specialist thinkers to discover that the emotions mentioned by Bacon, and many others not mentioned, often reduce the human being to almost an automaton before he commits the crime of murder. Jealousy, hatred, sex feeling often combine to cloud the judgement and stand in the way of the normal exercise of reason over a long period of time. Hence the crime which results, though it seems to be carefully premeditated, is none the less the product of prolonged emotional reaction.[1] If

[1] The famous Loeb Leopold Case is an instance in point. See an article on the subject in the *Journal of Mental Science* by Dr. M. Hamblin Smith, Medical Officer of H.M. Prison, Birmingham, and Lecturer at Bethlem Royal Hospital,

emotions alone do not account for it, there are other factors, such as epilepsy, psychoneurosis, and varieties of semi-infirmity which take away from the so-called murderer the full share of the responsibility which the law and society formerly fixed upon him. Apart, therefore, from a consciousness of the sanctity of human life there is the consciousness that the taking of life cannot be justified either on the theory of moral retribution or on the theory of deterrence. On the former theory it turns out iniquitous, on the latter it confesses impotence.

Thus the only object that now commends itself is that of elimination of the unsound and the unfit, with the possible prospect of reform in some cases, though not all. In proportion to the extent to which the idea of elimination, really a branch of the idea of social defence, is gaining ground, the idea of a death penalty is losing its hold on society. The voice of protest against capital punishment is gradually gaining in volume. It is no longer a sentimental cry, but a well-reasoned and organized scientific public opinion. England, essentially conservative, has not yet done away with capital punishment, but the active exertions of the Howard League and of the National Council for the Abolition of the Death Penalty point to a growing public consciousness in that direction. Before a committee appointed by the House of Commons, distinguished persons like Lord Buckmaster have recently testified to the inefficacy of the death penalty as a deterrent

London; also an article by him on 'The Mental Conditions found in certain Sexual Offenders' in *The Lancet*, 1924, i. 643. See also an interesting article from the pen of Enrico Ferri, 'A Character Study of Violet Gibson' in *Revue Internationale de Droit pénal*, vol. iv, part iii, in which, speaking of Violet Gibson, who attempted the life of Mussolini, Ferri observes: 'Insane criminals often have firm and strong will power which, however, is invariably domineered over and brought to confusion by terrifying hallucinations (as in cases of sudden mania in epileptics, alcoholics, &c.) or by fixed impulsive ideas (as in cases of chronic delusional insanity, for instance in paranoia). In other words Miss Gibson has a will power, but a sick will power.'

and its consequent unjustifiability. It is to be hoped the committee's recommendations will ultimately bring the law into line with the other progressive countries of the world which have abolished the death penalty—such as Norway, Sweden, Denmark, Holland, Belgium, Austria, Roumania, Italy, Portugal, Latvia, Lithuania, Finland, Uruguay, most of the Cantons of Switzerland, and twelve States of the American Union. The remaining thirty-six States of the Union retain the death penalty, but in twenty-four of these the court or the jury may substitute for it life imprisonment.[1]

Statistics are not always a safe guide to conclusions. But if statistics are appealed to, it is undoubted that their testimony does not support the proposition that murder has increased in those countries where the death penalty has been abolished. It appears that in Norway capital punishment was entirely abolished on 1 January 1905; and, says the late Mons. F. Woxen, Chief of the Norwegian Prison Administration, 'in the years 1905–24 the number of persons convicted of murder has diminished considerably'. We also have it from Mons. Victor Almquist, Chief of the Swedish Prison Administration, that in Sweden 'the reduction in the number of capital sentences and the final abolition of the penalty, so far from leading to an increase of offences of this kind, was actually followed by a notable decrease'. So also in regard to Denmark, Mons. Carl Torp, representative of the Danish Government on the International Prison Commission, observes, 'The abolition of capital punishment has not in any way contributed to an increase of such crimes as were formerly punished by death . . . the number of sentences (for murder) has decreased proportionally very considerably'.[2]

[1] *Criminology and Penology*, by John Lewis Gillin (The Century Co., New York), p. 357.

[2] The above facts are culled from a booklet published by the Howard League for Penal Reform to show the effect of abolition.

But it is often emphatically asserted that in America, at any rate, the abolition of capital punishment has been attended by a decided increase in the number of homicides. This is far from correct. On the contrary, we find that 'homicide rates (i.e. the number of homicides known to the police per annum per hundred thousand of the population) are available for the twenty-six States of the Registration Area during the eight years 1912–19. If these are arranged in order of average annual homicidal rates with the lowest first, the first state (with the least deaths by violence) is Maine, where capital punishment has been abolished for nearly forty years. Its homicidal rate is 1·80. Four of the next seven states have abolished capital punishment and the homicidal rates are less than 3·75. The eight states at the bottom of the list (each with a homicidal rate exceeding 7·00) all retain capital punishment. The states, therefore, which have abolished the death penalty take high rank amongst those with least murders; the States with the most murders retain capital punishment.'[1]

In truth, the rise or fall in the homicidal rates of a particular country depends on a plurality of causes in which the social, educational, industrial, and economic factors play a predominant part. It is but deep-rooted prejudice that seeks to make a scape-goat of the abolition doctrine by asserting that the cessation of the death penalty is attended by increase in the number of homicides.

The sister sciences of criminology and penology are now far too advanced to give way to popular cries, and it can scarcely be doubted that the abolition of the death penalty is a certainty of the immediate future. The memorable words of no less a person than Lord Ellenborough may well be recalled in this connexion. Speaking in 1833

[1] Pamphlet on *America and Capital Punishment* published by the National Council for the Abolition of the Death Penalty, at 18 Savoy Street, Strand, London.

before the House of Lords against the abolition of capital punishment *for theft* he thus administered the warning: 'Your Lordships will pause before you assent to a measure pregnant with danger to the security of property. The learned judges are unanimously agreed that the expediency of justice and the public security require that there should be no remission of capital punishment in this part of the criminal law.' Experience has proved that there was no foundation for the apprehension then entertained, and that society has not come to disruption owing to the abolition of the death penalty for stealing and kindred offences! A similar apprehension appears still to exist in the popular mind in regard to homicidal offences. But only the strictly scientific view should be allowed to prevail.

9. CONDITIONS IN BRITISH INDIA

A few words on Penology as it obtains in modern India are called for. The theory and practice of Prisons in India may generally be said to be those obtaining in Great Britain. But on closer examination the difference appears to be considerable. In regard to scientific classification of prisoners the ground is yet untrodden. Of late, some attention is being devoted to classification of a sort. But that is mainly with reference to the distinction between political and non-political, or Indian and European prisoners. A classification irrespective of political or racial considerations is urgently needed. Arrangements for juvenile and adolescent offenders are being attempted, notably in the Punjab and in Madras.[1] But there is great scope for improvement and it will be long before they can approach those in Great Britain, or their analogues in any other country. Children's Courts have been started in the Presidency Towns, but the true principle underlying them

[1] Borstals have been started at other places too. But the institutions are still in their infancy and their modes of working open to objection.

has not yet been grasped or put into practice. There are Reformatories for juveniles, but they are hardly different from regular prisons. There is no separate prison for women prisoners yet. No attempt has yet been made to introduce scientific methods of observation, examination, or treatment of mentally infirm or semi-infirm prisoners. In short, reformation or mental rehabilitation can hardly be said to be the objective of the prison system of modern India. Fortunately, there are signs of an awakening in the public and in the official mind on the subject of prison reform, and it is to be hoped that within the next decade a great deal more will be done than has hitherto been accomplished. The exact position now in British India may be summed up in the words of the Indian Jails Committee in their Report of 1920, since which date, however, no reform commensurate with the needs of the situation has been introduced on the lines recommended by them:

'It is certain that Indian prison administration has somewhat lagged behind on the reformative side of prison work. It has failed so far to regard the prisoner as an individual and has conceived of him rather as a unit in the jail administrative machinery. It has a little lost sight of the effect which humanizing and civilizing influences might have on the mind of the individual prisoner and has focussed its attention on his material well-being, his diet, health and labour. Little attention has been paid to the possibility of moral or intellectual improvement. In consequence, while the results of the Indian prison treatment are admitted generally to be deterrent, they are not generally regarded as reformatory. Witness after witness from almost every Province in India has, with singular unanimity, declared that Indian jails do not exercise a good or healthy influence on their inmates, that they tend to harden if not to degrade, and that most men come out of prison worse than they went in. We do not endorse this

view, but in so far as there is truth in it, it is a result, we are convinced, not of the men but of the system. The whole point of view needs to be altered, not merely isolated details; and we would add that the primary duty of keeping people out of prison, if it can possibly be done, needs to be more clearly recognized by all authorities, and, not least, by the courts' (p. 32).

CONCLUSION

AN enlightened public consciousness of the possibilities of reform that lie hidden in most, if not all, delinquents, an earnest and vigorous propaganda calling for an extensive and intensive application of scientific methods in the treatment of delinquents, and an insistent demand for schools of criminology and penology where doctors, magistrates, jailors, and judges may find the requisite training for the application of psychology to such treatment, can alone remove the reproach on the present-day prison methods, which vary merely in their degrees of imperfection in the different countries of the world.

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